90-38

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS
PETITIONERS

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; AND ALL OTHER SIMILARLY SITUATED COUNTIES AND CITIES
RESPONDENTS

CITY OF FAYETTEVILLE, ARKANSAS
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

1. Are the members of the Petitioner-class of cable television operators and subscribers in Arkansas still having Sales Taxes unconstitutionally imposed upon their respective sales and purchases of cable television services; when the provisions of the First Amendment have been held by the highest appellate courts of some of Arkansas' sister states to prohibit such excise taxes from being imposed upon the charges for the sale of goods or services when the statutory schemes for imposing Sales and Use Taxes in those states treat the electronic and print segments of the mass communications media differently?

2. What are the First Amendment standards to be applied to the rights of cable television operators and subscribers, when compared to the standards already established by this Court to protect the First Amendment rights of those engaged in other businesses involved in both the electronic and print segments of the mass communications media?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioners are cable television operators and subscribers who are representatives of a certified class of taxpayers that are subjected to the state and local Sales Taxes imposed by Act 188 of 1987, as amended by Act 769 of 1989, and include the following named Plaintiffs:

Petitioner Daniel L. Medlock is an individual, a subscriber to cable television services, and a resident of Little Rock, Pulaski County, Arkansas.

Petitioner Community Communications Company is an independent corporation that has no subsidiaries or affiliates, and which operates six cable television franchises in south and southeast Arkansas.

Petitioner Arkansas Cable Television Association, Inc. (ACTA) is an independent not-for-profit corporation that has no subsidiaries or affiliates, and is a trade organization composed of the operators of approximately 80 cable television systems in Arkansas.

Respondents are state or local officials of governmental entities wherein a Sales Tax is imposed and who are defendants in their official capacities, as follows:

Respondent James C. Pledger is the former Commissioner of Revenues of the Revenue Division of the Arkansas Department of Finance and Administration and the person who is charged by statute with administering the state and local Sales Taxes imposed in Arkansas.

Respondent Jimmie Lou Fisher is the Treasurer of the State of Arkansas and the person who is charged with disbursing funds to state agencies and to county and municipal governmental entities.

Respondents Donald Venhaus and Patricia Tedford are, or were, the County Judge and Treasurer, respectively, of Pulaski County, Arkansas, a county wherein a countywide local Sales Tax is imposed.

Respondent Joann Boone is the Treasurer of the City of Benton, Arkansas, a municipality wherein a local municipal Sales Tax is imposed.

Respondent City of Fayetteville, Arkansas, an intervenor, is a municipal corporation wherein a local municipal Sales Tax is imposed.

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CITY OF FAYETTEVILLE, ARKANSAS
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Daniel L. Medlock, et. al., respectfully petition for a Writ of Certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS

The opinion of the Supreme Court of Arkansas (App. B, *infra*, 3a) is reported at 301 Ark. 483, 785 S.W.2d 202. The Order of the Supreme Court of Arkansas denying the petitions for rehearing is unreported (App. A, *infra*, 1a).

The opinion (App. D, *infra*, 1a) and Order and Judgment (App. C, *infra*, 9a) of Chancellor Lee A. Munson of the Pulaski County Chancery Court are unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. B, *infra*, 3a) was rendered on February 28, 1990, and timely filed Petitions for Rehearing by both the Petitioners and the Respondents were filed and denied on April 2, 1990 (App. A, *infra*, 1a). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution:

Amendment 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statutes:

Ark. Code Ann. § 26-52-301(3)(D), as amended, App. E, *infra*, 23a.

STATEMENT OF THE CASE

The State of Arkansas has imposed a Sales Tax since 1941 and has imposed a corresponding Compensating (Use) Tax since 1949. The sale or consumption of *all* tangible personal property is subject to either the Sales or Use Taxes, unless specifically exempted. However, there are only certain enumerated services that are subjected to the Sales Taxes, while no services are subjected to Arkansas' Compensating (Use) Taxes. Since 1981, countywide and citywide Sales and Use Taxes have been imposed, on a local option basis, upon the sale or consumption of the same items to which the state Sales or Use Taxes apply.

The Arkansas General Assembly adopted Act 188 of 1987 (App. G, *infra*, 28a), effective July 1, 1987. This Act imposed, for the first time, Arkansas' state and local Sales Taxes upon charges made by cable operators in return for providing cable television services to subscribers in the State of Arkansas. No amendment was made to Arkansas' Compensating (Use) Tax by Act 188 of 1987.

With regard to the sale of goods or services by businesses involved in the mass communications media in Arkansas, as of July 1, 1987, Arkansas' statutory scheme of Sales and Use Taxes imposed Sales Tax upon the sale of cable television service, and books and magazines sold over the counter (but not by subscription). The sale of newspapers and the sale of advertising in newspapers and on billboards were specifically exempted from the imposition of Arkansas' Sales and Use Taxes. Likewise, either by statutory exemption, administrative ruling, or because of this Court's decision in the case of *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 421 (1987), the sale of magazines by subscription (whether printed within or without the State of Arkansas) were exempted from the imposition of Arkansas' Sales and Use Taxes. The sale of "scrambled" satellite television broadcast programming to home dish-antenna owners for a subscription fee and the advertising sold to sponsor local wireless broadcast radio and

television services were simply not mentioned by Arkansas Sales and Use Tax Acts, and, therefore, were "excluded" from the tax basis for these two excise taxes.

In late May of 1987, before the Sales Taxes imposed by Act 188 became effective, Daniel L. Medlock, a cable television service subscriber; Community Communications Company, a cable television operator with six (6) franchised systems in Arkansas; and the Arkansas Cable Television Association, Inc. (ACTA), a trade organization composed of approximately 80 cable operators with cable systems in the State of Arkansas, instituted this class action suit in the Pulaski County Chancery Court to contest the constitutionality of the state and local Sales Taxes imposed upon the charges for cable television service by Act 188 of 1987. The Petitioners' complaint alleged that cable television services were singled out, among other businesses that were involved in both the print and electronic segments of the mass communications media, by the imposition of these state and local Sales Taxes. The Petitioners alleged that the adoption of Act 188 of 1987 violated (1) their First Amendment rights of free speech and free press, (2) their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution, and (3) the Supremacy Clause of the U.S. Constitution, because Congress had preempted this area of the law by stating in the Cable Communications Policy Act of 1984 (47 U.S.C. § 542) that no state or local excise tax could discriminate against cable television service.

The Petitioners' suit was certified as a class action; the trial court Chancellor ordered that the challenged state and local Sales Taxes to be escrowed and that the state Revenue Division was enjoined to keep separate records so as to be able to identify the payors of the monthly collections of such Sales Taxes.

At the various pretrial evidentiary hearings and at the trial in this case, extensive testimony and documentary evidence was introduced regarding the operation of cable

television systems, the programming available and the programming choices made by cable operators, and how the various cable television services compared with similar services provided by both the print (newspaper and magazine) and wireless broadcast (radio and television) segments of the mass communications media.

In his decision entered on March 10, 1989, the trial court Chancellor made Findings of Fact and Conclusions of Law (App. D, *infra*, 11a). Therein he made specific findings that cable television was entitled to claim the First Amendment protected rights of free speech and free press. The Chancellor drew many analogies between cable television and the print segment of the mass communications media, including the constant or continuing exercise of editorial discretion by cable operators in making programming decisions. The Chancellor also found that cable system operators are cablecasting a retransmission of original works by others while some of the programming is actually originated by the cable television system operators or is programming produced specifically for cable television system distribution. The Chancellor specifically found (*infra*, 14a):

> 7. The "cable casting" by cable television operators provides Arkansans with a variety of programming which presents a mixture of news, information and entertainment. This programming seeks to provide a wide variety of topics and formats, including regular news and entertainment programming, public access channels, public announcements and electronic bulletin board.

The Chancellor also noted that the Petitioners' witnesses testified that they considered the totality of cable television programming to be the equivalent of an "electronic magazine." (App. D, *infra*, 14a)

In his Conclusions of Law, the Chancellor specifically found (App. D, *infra*, 17a):

> 2. Cable television operations are covered by the First Amendment to the Constitution of the United States. The First Amendment privileges apply to both the cable television systems operators and cable television subscribers' right to receive cable programming.

After citing and quoting with approval from this Court's decision in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, (1986), the Chancellor proposed the question to be decided as:

> This Court must determine the extent of First Amendment protected rights of cable television. (App. D, *infra*, 18a)

Thereafter, relying upon certain decisions for the United States Courts' of Appeal for the Seventh, Eighth and Tenth Circuits, the Chancellor upheld the constitutionality of Act 188's imposition of these Sales Taxes upon cable television services, principally because cable television was found to make a much greater utilization of the public rights-of-way than do businesses engaged in either (1) the other electronic segments or (2) the print segments of the mass communications media. The Chancellor held that the raising of revenues *was* a sufficiently compelling governmental interest to satisfy this Court's constitutional test for incidental effect upon First Amendment rights, and, therefore, the Petitioners' constitutional challenge to the Sales Taxes was held to have failed.

On March 13, 1989, the Chancellor entered judgment, dismissing the Petitioners' complaint, and releasing approximately $6.2 million of previously escrowed state and local Sales Taxes (App. C, *infra*, 9a).

On March 21, 1989, the Arkansas General Assembly adopted Act 769 of 1989 (App. H, *infra*, 30a) to amend the provisions of Act 188 of 1987 (which had by then been codified as Ark. Code Ann. § 26-52-301(3)(D) (App. E, *infra*, 23a), so as to

also extend these state and local Sales Taxes to certain charges made by out-of-state providers of "scrambled" satellite broadcast television subscription services supplied to Arkansas subscribers. However, Act 769 did not amend Arkansas' Compensating (Use) Tax statutes. Therefore, subscription fees charged for "scrambled" satellite television broadcast services to subscribers located in Arkansas are still not subject to Arkansas' Compensating (Use) Tax when they are paid by the Arkansas subscriber directly to the out-of-state provider. Under this 1989 amendment to the Arkansas Sales Tax Act, subscription fees for "scrambled" satellite services are subject to Arkansas' Sales Taxes only when they are paid to an in-state collecting agent, e.g. a local cable operator.

On appeal to the Arkansas Supreme Court, the Petitioners requested that court to find that the statutory scheme of Sales Tax imposition on business engaged in the mass communications media, even after its amendment by Act 769 of 1989, still unconstitutionally discriminated against cable television services. The Arkansas Supreme Court, in a decision entered on February 28, 1990 (App. B, *infra*, 3a), overturned the Pulaski County Chancery Court's determination and held that the imposition of the state and local Sales Taxes upon the cable television services by Act 188 of 1987 was unconstitutional, because these excise taxes violated the First Amendment rights of free speech and free press belonging to the Petitioners. The state Supreme Court specifically rejected the public rights-of-way analogy exception proferred by the State of Arkansas and adopted by the trial court Chancellor, mainly because the Petitioners paid a municipal franchise (i.e. rental) fee for the use for these public rights-of-way. However, the Supreme Court did not delineate in its opinion what it considered were the First Amendment protected rights that did apply to the cable television service. Instead, the Arkansas Supreme Court simply noted this Court's prior decision in *Preferred Communications*, *supra*, and approved by reference the discussion of such First Amendment rights by the District of Columbia Court of Appeals in *Quincy Cable TV, Inc. v. F.C.C.*, 768 F2d 1434 (C.A.D.C., 1985), *cert. denied*, 476 U.S. 1169 (1986). (App. B, *infra*, 6a).

Thereafter, the Arkansas Supreme Court very briefly mentioned and discussed four decisions of this Court dealing with the First Amendment protected provisions of free speech and free press, especially as they relate to state taxation. The Court then held that the state and local Sales Taxes in Arkansas imposed upon charges for cable television services by Act 188 of 1987 were unconstitutional for the period from July 1, 1987, through June 30, 1989, because these excise taxes were discriminatorily applied between mass communicators delivering substantially the same services. However, the Arkansas Supreme Court specifically refused to compare cable television's First Amendment rights to those businesses involved in the print segment of the mass communications media, and, therefore, refused to hold that these Sales Taxes were unconstitutional for periods after the amendment of the Sales Tax Act, effective July 1, 1989, by Act 769 of 1989.

Timely Petitions for Rehearing were filed on behalf of the State of Arkansas (arguing the applicability of the public rights-of-way analogy) and by the Petitioners (arguing both the ineffectiveness of the 1989 amendment to the Sales Tax law and the refusal of the Arkansas Supreme Court to treat cable television services and the print segments of the mass communications media as similarly situated taxpayers for purposes of applying this Court's First Amendment devised constitutional test). Both these Petitions for Rehearing were denied by the Supreme Court's order of April 2, 1990. (App. A, *infra*, 1a).

REASONS FOR GRANTING THE PETITION

The Petitioners submit that the two questions presented by this case establish that there is a conflict between the opinion here, by the Arkansas Supreme Court, and opinions by other state and federal appellate courts regarding the proper interpretation of the First Amendment, as it applies to both the electronic and print segments of the mass communications media. The answers to these questions can only be supplied by a ruling of this Court and they are of great national importance, not only in the administration of the Sales and Use Tax laws of the various states, but also in the very regulation and operation of cable television systems throughout the country.

The Petitioners acknowledge that the State of Arkansas has the power to impose a Sales Tax upon charges for cable television service. However, Arkansas' statutory scheme for imposing these Sales Taxes (like that of many of its sister states) does not impose these excise taxes equally upon all similarly situated and First Amendment protected businesses involved in the mass communications media. Thus, the Petitioners submit Arkansas' Sales Taxes cannot single them out when other similarly situated businesses engaged in both the electronic and print segments of the mass communications media are not taxed.

Forty-five states and the District of Columbia impose some sort of Sales Taxes (or other gross receipts based excise taxes) upon the sale of goods and services. Many thousands of local governmental entities impose local option Sales Taxes or gross receipts based service, telecommunications or amusement excise taxes. The Petitioners submit that at least half of the states and hundreds of these local governments impose some sort of gross receipts based excise tax upon the charges made for providing some level of cable television service. The amount of taxes in question in this case alone exceeds more than $4.0 million per year, and that figure must be multiplied many times in analyzing the amount of gross receipts based excise taxes raised from cable television services that are collected by governments with more populous venues than Arkansas.

Thus, the Petitioners believe that the federal constitutional questions presented here are of substantial national importance to those involved in the programming and operation of the cable television industry, to millions of cable television subscriber-taxpayers, and to a vast number of state and local governments. Therefore, these questions should be addressed by this Court to decide these important issues of federal constitutional law.

I. A CONFLICT EXISTS BETWEEN THE DECISION BY THE ARKANSAS SUPREME COURT IN THIS CASE AND SIMILAR DECISIONS OF OTHER STATE AND FEDERAL APPELLATE COURTS REGARDING THE FIRST AMENDMENT STANDARDS TO BE APPLIED TO CABLE TELEVISION AND THE DECISION OF THE ARKANSAS COURT IS ERRONEOUS.

The Appellants submit that there is a real conflict between the limited application here by the Arkansas Supreme Court of the First Amendment based standard or test enunciated by this Court in its decisions in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983) and *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987), and similar decisions by other state and federal appellate courts. Thus, for periods after July 1, 1989, [1] the Petitioners are still having their charges for cable television services unconstitutionally subjected to Arkansas' state and local Sales Taxes, when similarly situated taxpayers in other states with similar statutory schemes for Sales Taxes do not have to pay such excise taxes upon the same charges. The appellate courts of these other states have held, in light of taxpayers' First Amendment challenges, that a statutory scheme of Sales Tax that does not impose these taxes equally upon both the electronic segment and the print segment of the mass communications media violates the First Amendment. Also, the

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[1] The effective date of the amendment of Ark. Code Ann. §25-52-301(3)(D) by Act 769 of 1989.

vast majority of subscribers to "satellite" subscription television broadcast services in Arkansas are still not subject to Arkansas Sales Tax, even after the 1989 amendment to the statute.

a. *Conflict with Decisions of Other State Appellate Courts*

The Arkansas Supreme Court, in the instant case, held that "scrambled" broadcast television services sold on a monthly subscription fee basis were the *only* services of those involved in the mass communications media in Arkansas that were similar to those of cable television for First Amendment comparison purposes. The Arkansas Supreme Court refused to apply a broader measurement to determine *similarly situated* taxpayers for purposes of this First Amendment challenge, so as to include either (1) other businesses involved in the electronic segment or (2) businesses involved in the print segment of the mass communications media. Thus, the Arkansas Supreme Court has elected to very narrowly apply this Court's First Amendment test for state taxes that was mandated in the *Minneapolis Star* and *Arkansas Writer's Project* cases.

In two of Arkansas' sister states, Oklahoma and New York, the highest appellate courts of those states have very recently rendered decisions that broadly and generally apply the *Minneapolis Star* and *Arkansas Writer's Project* enunciated First Amendment standards to taxes imposed by their states that were discriminatorily imposed between businesses involved in the electronic segments and the print segments of the mass communications media. Those courts both held their state's statutory scheme of taxation to be unconstitutional because the businesses involved in the electronic segment were taxed differently than those

businesses involved in the print segment of the mass communications media. [2]

In both of these states, the taxing agencies maintained that businesses involved in the print segments and the electronic segments of the mass communications media were different; that the electronic segment of the mass communications media was susceptible to more government regulation; and that the differential taxation that resulted was a reasonable classification made by the respective state legislatures. In both instances, the Oklahoma and New York courts held that the "strict scrutiny" standard of the First Amendment, not the "rational basis" standard of the Fourteenth Amendment, applied to test the constitutionality of the challenged taxes, and that the burden was placed upon the states to show a compelling governmental interest that was served by the differential treatment of these businesses involved in the electronic and print segments of the mass communications media. In commenting upon the *Minneapolis Star* and *Arkansas Writer's Project* tests, in *Oklahoma Broadcasters Association*, the Oklahoma Supreme Court stated (789 P.2d at 1316):

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[2]See, *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 P.2d 1312 (Okla., 1990), *Dow Jones & Co. v. Oklahoma Tax Commission*, 787 P.2d 843 (Okla., 1990), and *McGraw-Hill, Inc. v. State Tax Commission*, 541 N.Y.S.2d 252 (App. Div. 3 Dept., 1989), *affirmed and adopted*, 552 N.E.2d 163 (N.Y., 1990). It must be noted that the Oklahoma Supreme Court, in its *Dow Jones* opinion (787 P.2d at 846) specifically found that Arkansas' and Oklahoma's statutory schemes of Sales Taxes were sufficiently similar to enjoin the application of the *Arkansas Writer's Project* teaching to the Oklahoma Sales Tax laws. The Petitioners submit that the converse should also be true with regard to the rationale of these two Oklahoma Supreme Court decisions being equally applicable in this case. The Oklahoma Supreme Court specifically rejected the narrow or limited application of the First Amendment tests adopted by the Arkansas Supreme Court in this case by holding (787 P.2d at 846):

> [W]e find that the Court announced constitutional standards are meant for broad and general application to the press.

> Though both *cases* admittedly deal with differential treatment among members of the *print media*, there is nothing to suggest that this Court should, without sufficient justification, accrue preferential treatment of the print media over the broadcast media, where both are members of the press. The First Amendment guarantees freedom of the press—not just the *printed* press.
>
> These exemptions have resulted in differential treatment and are, therefore, subject to constitutional review. The test is whether the State can justify such differential treatment with a "counter balancing interest of compelling importance that it cannot achieve without differential taxation."

With regard to the Oklahoma Tax Commission's argument that differential taxation is permissible because the broadcasting media was subjected to a higher degree of regulation than the print media, [3] the Oklahoma Court held (789 P.2d at 1317):

> We find no merit to this argument. The cases cited by Appellant Tax Commission deal with *regulation* of the broadcast industry in that broadcast wavelengths represent a limited resource. No analogy can be drawn to the present challenge.

Likewise, in the differential treatment of advertising income for purposes of computing corporate franchise taxes, the intermediate New York Appellate Court held (541 N.Y.S.2d at 255):

> Given that there was differential treatment between the print media and the broadcast media in this case, it is incumbent upon Respondent to show that 20 NYCRR 4-4.3(f)(2) was necessary to serve a

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[3] This is exactly the same argument proffered by the Arkansas Revenue Division in the instant case regarding the greater utilization of public rights-of-way by the cable industry, which argument was rejected by the Arkansas Supreme Court.

> compelling State interest. This in our view it did not do. Respondent claims that the unique nature of the electronic media makes it more susceptible to governmental regulation and that there are many differences between the print and visual media. While this may be true, such an argument fails to show any compelling state interest in taxing the two types of media differently. Thus, the regulation must fall. . . . To conclude, we find, that the regulation at issue is unconstitutional under the 1st Amendment and grant the petition.

The Petitioners submit that either the highest or intermediate appellate courts of other states [4] have also more broadly applied this Court's *Minneapolis Star* and *Arkansas Writer's Project* standards in declaring state or local Sales Taxes (that are virtually the same as those imposed by the State of Arkansas in this case) and that the taxpayers in those states, like the subscriber-taxpayers to cable television services in the States of Oklahoma and New York, would not be subjected to the Sales Taxes that have been approved by the

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[4]See, *Newsweek, Inc. v. Celauro*, ____ S.W.2d ____, 1990 W.L. 61899 (TN., March 5, 1990); *Southern Living, Inc. v. Celauro*, ____ S.W.2d ____, 1990 61902 (TN., March 5, 1990); *Louisiana Life, Ltd. v. McNamara*, 504 S.2d 900 (La. App. 1st Div., 1987); *City of Alameda v. Premier Communications Network, Inc.*, 202 Cal. Rptr. 684 (Cal. App. 1 Dist., 1984), *cert. denied*, 469 U.S. 1073 (1984); and *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988).

Arkansas Supreme Court in this case for all periods after July 1, 1989. [5]

b. *Conflict with Federal Decisions Regarding First Amendment Rights*

The Arkansas Supreme Court's refusal to broadly compare the First Amendment rights of cable television to those enjoyed by businesses involved in the print segment of the mass communications media is one that is at odds with decisions made by various federal courts of appeal and district courts that have previously addressed the question of the First Amendment rights enjoyed by cable television, especially in cases involving FCC regulation or franchising disputes. [6] The rationale set forth in the decision by the District of Columbia

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[5]The effective date for the amendment of Ark. Code Ann. § 26-52-301(3)(D) by Act 769 of 1989. This amendment was enacted after the decision was rendered by the trial court and while this case was on appeal. Therefore, the Petitioners have had no opportunity to present evidence to support their constitutional challenge upon the 1989 amendment to the Arkansas Sales Tax law. Notwithstanding, the Arkansas Supreme Court appears to have given prospective constitutional approval to Arkansas' statutory scheme for imposing Sales Tax, for periods after the 1989 amendment. On remand in this case (June 27, 1990), the Chancellor denied the Petitioners' Rule 15(d) A.R.C.P. motion to amend their complaint, in this action, to directly challenge the 1989 amendment. The State of Arkansas has indicated that it will argue *res judicata* or *collateral estoppel*, if these Petitioners institute a new and separate action to contest Arkansas' statutory scheme of Sales Taxes, for periods after the 1989 amendment. Therefore, the Petitioners' first question presented raises a legitimate and timely issue, even though the Petitioners succeeded in the Arkansas Supreme Court on their constitutional challenge for all periods prior to the 1989 amendment.

[6]See, *HBO v. FCC*, 567 F.2d 29 (C.A.D.C., 1977), *cert. denied*, 434 U.S. 839 (1977); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (C.A.D.C., 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (C.A.D.C., 1987), *cert. denied*, 108 S.Ct. 2014 (1988); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (C.A.6, 1985), *affirmed and remanded*, 476 U.S. 488 (1986); *Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559 (N.D. Cal., 1968); and *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal., 1987).

Court of Appeals in the *Quincy Cable TV* case is representative of the First Amendment analysis utilized by these federal courts [7] in applying this "balancing of interest" test. In that case, the federal appellate court held (768 F.2d at 1450):

> *While Miami Herald* involved the conventional press, as this Court had prior occasion to observe, there is no meaningful "distinction between cable television and newspapers on this point." *Home Box Office, Inc. v. FCC, supra*, 467 F.2d at 46.
>
> Indeed, once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic entity for purposes of First Amendment, the analogy to more traditional media is compelling. Two influential commissions have in fact reached precisely that conclusion. In the words of Cabinet Committee on Cable Communications, "[C]able development has the potential of creating an electronic media of communications more diverse, more pluralistic and more open, more like the print and film media than like our present broadcast system." . . . See also, *Sloan Commission on Cable Communications*, On the Cable 92 (1971) "Cable television by freeing television from the limitations of radiated electro-magnetic waves, creates . . . a situation more clearly analogous to that of the [print] press." (Citations omitted)

Though only the *Century Federal* case involved a First Amendment challenge to a state or local tax, all of these federal courts recognized that there was no logical reason to limit the comparison of First Amendment rights of cable television to only those of other electronic segments of the mass communications media. Instead, each of these courts applied the broader First Amendment standards or protections

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[7] All of these federal courts have applied the "strict scrutiny" or "balancing of interest" tests devised by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968), which test was made applicable to First Amendment challenges to state taxes by this Court's decisions in *Minneapolis Star* and *Arkansas Writer's Project, supra*.

generally applicable to businesses involved in the print segment of the mass communications media. Apparently, the only reason the Arkansas Supreme Court refused to more broadly apply this Court's First Amendment mandated test for state taxes is because the Arkansas court found no specific decision by this Court that actually compared the print and electronic segments of the mass communications media (App. B, *infra*, 7a).

c. *The Arkansas Supreme Court's Approval of the Amended Statute is Erroneous.*

The Petitioners submit that the Arkansas Supreme Court's approval of the constitutionality of the statutory scheme of Sales Tax, after the 1989 amendment by Act 769 of 1989, is erroneous. This amendment is, in fact, illusory in having any effect of eliminating the unconstitutional discrimination that the Arkansas Court found actually existed for the two previous years under Act 188 of 1987. The only sales of "scrambled" satellite television broadcast subscription services that are now subjected to an excise tax in Arkansas are those that are paid by the subscribers-owners of Arkansas dish-antennas to collecting agents (*e.g.* cable operators) that are located within the State of Arkansas and who are merely local "collecting agents" for the out-of-state providers of such "scrambled" satellite services. However, if the subscription fee for the "scrambled" satellite service is paid by the Arkansas subscriber-taxpayer directly to the out-of-state provider (which is the situation in fully 80%-90% of the instances), then the sale is one that is completed in interstate commerce (*i.e.* at the place the payment is received by the out-of-state provider). Such sales cannot constitutionally be subjected to Arkansas' state and local Sales Taxes.[8] Such out-of-state purchases could constitutionally *only* be subjected to a Compensating (Use) Tax

[8]See this Court's decisions in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) (affirming a decision of the Arkansas Supreme Court that held that Arkansas' Sales Tax cannot apply to a purchase completed outside of the boundaries of the state); and *National Bellas Hess, Inc. v. Dept. of Revenue of Illinois*, 386 U.S. 753 (1967).

by the State of Arkansas. Act 769 of 1989 did *not* amend the Arkansas Compensating Tax Act (Ark. Code Ann. § 26-53-106, App. F, *infra*, 26a), so the purchase of such "scrambled" satellite services are still not subject to Arkansas' Compensating (Use) Tax.

Further, if the 10%-20% of the Arkansas based subscriber-taxpayers to "scrambled" satellite broadcast television services who now pay Arkansas' Sales Taxes (because of the passage of Act 769 of 1989) would simply change their method of payment from the *in-state* collecting agent, to make their payments *directly* to the *out-of-state* provider of such satellite services, the 1989 amendment to Arkansas' Sales Tax law would have absolutely no effect and the charges for their "scrambled" satellite services would be freed of any Arkansas excise tax. Thus, if all such subscribers to "scrambled" satellite services merely changed their method of payment, then exactly the same situation would exist (*i.e.* no tax on "scrambled" satellite services and Sales Tax on cable television services) which the Arkansas Supreme Court itself found violated the First Amendment rights of the Petitioners for the two year period from July 1, 1987, through June 30, 1989. Therefore, the Petitioners submit that the 1989 amendment to the Arkansas Sales Tax Act was without "practical substance" to address the constitutional infirmity that was found to exist in Arkansas' statutory scheme for imposing Sales Taxes.

Because of the three reasons outlined above, the Petitioners' First Amendment rights will continue to be violated by the imposition of Arkansas' Sales Taxes, while similarly situated subscriber-taxpayers of virtually the same services (in both Arkansas and these other states) will not be subjected to Sales or Use Taxes upon their purchase of cable or "scrambled" satellite services. This denial of constitutional rights must be cured by this Court's reversal of the Arkansas Supreme Court's decision in this case.

II. THE TIME HAS COME FOR THIS COURT TO DELINEATE THE FIRST AMENDMENT RIGHTS OF CABLE TELEVISION.

Cable television has now grown to the point where it is an equal, though distinctly separate, part of the overall mass communications media, along with wireless broadcast radio and television businesses and the print (newspaper and magazine) segment of the media. All of these mediums of communication transmit to their customer-subscriber-viewer-listeners a mix of news, information and entertainment. Each of the older more established segments of the mass communications media have had their First Amendment rights defined by numerous decisions of this Court. The Petitionrs submit that the time is now ripe for this Court to delineate the First Amendment rights of cable television in this case.

The instant case provides a fully developed evidentiary record that compares the functions, activities and programming of cable television with businesses involved in both the print segment and the other electronic segments of the mass communications media. The evidentiary record in this case establishes that there is integrated ownership of, and coordinated promotion of, both print and cable television businesses; that the exercise of editorial discretion in the choosing of programming by cable operators is virtually the same as that exercised by editors of newspapers or magazines; that there is unique programming and information generally available from cable television service that is not generally available from other businesses involved in the electronic or print segments of the mass communications media; and that cable service provides a variety of programming, through a

virtually unlimited number of channels, that causes its overall programming to be the equivalent of an "electronic magazine."[9]

Not only does cable television provide unique programming (*e.g.* the coverage of both the U.S. House of Representatives and the U.S. Senate on C-SPAN I and II) that is not readily available from other segments of the mass communications media, but the information and programming provided by certain of its specialized services is virtually the same as the information supplied by many businesses involved in the print segment of the mass communications media. For example, ESPN supplies coverage of athletic events that is virtually the same as that supplied by *Sports Illustrated* and *Sport* magazines; the information conveyed daily by the Financial News Network is the same as the information conveyed by *Fortune*, *Barrons* or *The Wall Street Journal*; while Cable News Network generally provides the same type of information as *Time*, *Newsweek* or *U.S. News & World Report*, and CNN Headline News provides information similar to that found in *USA Today* or any daily newspaper. In fact, taken as a whole, cable programming (which contains a rebroadcast or retransmission of original works by others, some advertising, and some original programming), provides virtually the same type of general information and entertainment as do general interest magazines, such as the *Reader's Digest*.

The cable television industry has grown from its infancy 40 years ago until it is now a fully developed, separate and

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[9]For commentators who make compelling arguments that cable television should be provided the same broad First Amendment protections afforded the print segment of the mass communications media, as opposed to the more restrictive First Amendment rights awarded the wireless broadcast segment of the mass communications media, see, Parsons, *Cable Television and the First Amendment*, Lexington Books (1987); Shapiro, Kurland & Mercurio, *Cable Speech: The Case for First Amendment Protection* (1983); Note, *Cable Television and the First Amendment*, 71 Col. L. Rev. 1008 (1971); and Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U.L. Rev. 133 (1976).

distinct part of the mass communications medium that virtually every citizen of this country relies upon every day. Especially, in the last 20 years, cable television has developed from a passive receiver into a full fledged provider of programming that is much more diverse than can ever be supplied by any one or even a combination of wireless broadcast television networks. During this last 20 year period of time, the decisions of this Court which have dealt with the question of the regulation or control of cable television by the F.C.C. [10] have gone from an easy acceptance of the FCC's assertion of jurisdiction over the cable industry (as being ancillary to that agency's duty to regulate wireless broadcast radio and television), to one where this Court now appears ready to finally delineate the First Amendment rights and standards that are applicable to this new and separate medium of expression.

In 1984, Congress adopted the Cable Communications Policy Act, 47 U.S.C. § 521, *et seq.*, for the purpose of setting a national policy regarding this new segment of the mass communications media. Through this legislative action, Congress specifically stated that it was recognizing the First Amendment rights of both cable operators and cable subscribers. [11]

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[10]See, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Fortnightly Corp. v. United Artist Television, Inc.*, 392 U.S. 390 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *Capital Cities, Inc. v. Crisp*, 467 U.S. 691 (1984) and *City of Los Angeles v. Preferred Communications Corp.*, 476 U.S. 488 (1986). Also, the Petitioners note that, interspersed among these last three cited decisions, this Court has also refused to grant *certiorari* in decisions of the District of Columbia Court of Appeals that have struck down FCC regulation of cable television, on First Amendment grounds, in the cases of *HBO v. FCC, supra; Quincy Cable TV, Inc. v. FCC, supra;* and *Century Communications Corp. v. FCC, supra.*

[11]See, H. Rept. 98-934, 98th Cong. 2d Sess. (1984), U.S. Code & Admin. News, Vol. 5, p. 4655, at 4668. Also, the members of this Court should note that there are several pending Bills, *e.g.* S. 1880, 101 Cong., 1st. Sess., where some would seek to "reregulate" cable television. A comprehensive delineation of the First Amendment rights of cable television in this case could be of substantial guidance and benefit to the members of Congress as that address this important question.

In this Court's 1984 decision in *FCC v. League of Women Voters of California*, 468 U.S. 365 (1984), Justice Brennan noted (468 U.S. at 376-377, ftnt. 11):

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent chairman of the FCC, charged that with the advent of cable and satellite television technology, communities now have access to such a wide veriety of stations that the scarcity doctrine is obsolete. See, e.g. *Fowler & Brunner, A Marketplace Approach to Broadcast Regulation*, 60 Texas L. Rev. 207, 221-226 (1982). We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

The Petitioners submit, if this Court finds that it is still not time to reexamine its longstanding approach regarding the regulation of the wireless broadcast industry, that the time *has come* for this Court to delineate the general First Amendment rights and standards applicable to cable television as the newest full and separate member of the mass communications media. To make a horticultural analogy, perhaps more rapidly than any other segment of our country's mass communications media, cable television has flowered from a mere bud to a mature blossom in only 20 years. Like other hybrids, this flower may have certain characteristics of its forebearers, but it is, indeed, a new variety that has earned and must be awarded its own separate classification in the mass communications genre.

By taking this opportunity to delineate such First Amendment guidelines, this Court would also give much needed guidance to not only the state courts with regard to matters of taxation, but also to the lower federal courts, which

seem to be in some conflict regarding cable television access or regulation. [12]

The Petitioners submit that it is now time for this Court to take this opportunity, as mentioned by Justice Blackmun in his concurring opinion in the *Preferred Communications* case (106 S.Ct. at 2038) so that—

> "The Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis."

In either instance, the Petitioners submit that the time is ripe for this Court to delineate the First Amendment rights of cable television operators and subscribers, and that the fully developed evidentiary record in this case will provide an excellent vehicle to exercise such an opportunity.

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[12]See the decisions of the District of Columbia Court of Appeals in *HBO v. FCC, supra; Quincy Cable TV, Inc. v. FCC, supra;* and *Century Communications Corp. v. FCC, supra,* and the Ninth Circuit in *Preferred Communications, Inc. v. City of Los Angeles,* 754 F.2d 1396 (C.A.9, 1985), *affirmed* and *remanded, City of Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488 (1986), as compared with the decisions of the Third Circuit in *Erie Telecommunications, Inc. v. City of Erie, Pa.,* 853 F.2d 1084 (C.A.3, 1988), the Seventh Circuit in *Chicago Cable Communications v. Chicago Cable Commission,* 879 F.2d 1540 (C.A.7, 1989) and *Omega Satellite Products, Co. v. Indianapolis,* 694 F.2d 119 (C.A.7, 1982); the Eighth Circuit in *Central Telecommunications, Inc. v. TCI Cablevision, Inc.,* 800 F.2d 711 (C.A.8, 1986); and the Tenth Circuit in *Community Communications, Inc. v. City of Boulder,* 660 F.2d 1370 (C.A.10, 1981). A settling of the apparent conflict over the First Amendment standards or limits, if any, applicable to the regulation of cable television would be of great benefit to the FCC, the thousands of franchising municipalities, and the businesses involved in the cable industry.

CONCLUSION

For the various reasons set forth above, this Petition for Certiorari to the Arkansas Supreme Court should be granted to answer the two questions presented by the Petitioners.

Respectfully submitted,

JUNE 29, 1990

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APPENDIX A

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

April 2, 1990

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Re: 89-89 Daniel L. Medlock et al.
v. James C. Pledger, Commissioner
of Revenue et al.

Gentlemen:

The Supreme Court made the following order in the above styled case today:

> "Petitions for Rehearing are denied. Dudley and Price, JJ., not participating."

Sincerely yours,

LESLIE W. STEEN, CLERK

BY: Robin Horne

LWS:rh
cc: David P. Henry
Robert Parker
Frank J. Wills, III
James N. McCord, II
Larry Vaught
Alice Holcomb
(#87-2401)

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 89-89

Opinion delivered: Feb. 28, 1990

DANIEL L. MEDLOCK, et al.

Appellants

v.

JAMES C. PLEDGER, et al.

Appellees

Appeal from Pulaski County Chancery Court (87-2401)

Honorable Lee A. Munson, Chancellor

Reversed and Remanded

DAVID NEWBERN, Associate Justice

The question in this case is whether the imposition of a sales tax on cable television service is an unconstitutional, and thus illegal, exaction because the tax does not apply to other mass communications media. We hold that, for a time, the tax was illegal because it was not levied on other, similar services, such as satellite television programming. Now that the tax has been made to apply to all similarly situated businesses, however, its illegality has been cured. We remand the case to the chancellor so that the taxes illegally collected may be refunded to those who paid them.

By Act 188 of 1987 the general assembly added to the services to be subject to the sales tax:

> Cable television services provided to subscribers or users. This shall include all service charges and

> rental charges whether for basic service or premium channels or other special service, and shall include installation and repair service charges and any other charges having any connection with the providing of cable television services.

By Act 769 of 1989, the language was changed to the following:

> Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services.

Act 769 was signed by the governor on March 21, 1989, and in accordance with its emergency clause, became law on July 1, 1989. The act is now codified as Ark. Code Ann. § 26-52-301(3)(D)(i) (Supp. 1989).

Act 188 was promptly challenged by the appellants, Daniel L. Medlock, Community Communications Co., and the Arkansas Cable Television Association, Inc., on behalf of themselves and all other similarly situated taxpayers. The appellees are James C. Pledger, Commissioner of Revenues, and various state, county, and city officials, Pulaski County, the City of Benton, and all other similarly situated counties and cities. The City of Fayetteville intervened.

As Act 769 had not become law when the chancellor made his ruling, the sole question before him was the constitutionality of Act 188. The taxpayers challenged it as being in violation of their rights of freedom of speech and

freedom of the press guaranteed by the First Amendment, their right to equal privileges and immunities guaranteed by U.S. Const., art. 4, § 2, and Ark. Const. art. 2, § 18, and their right to equal protection of the laws guaranteed by the Fourteenth Amendment and Ark. Const. art. 2, § 3. They also claimed protection under 47 U.S.C. § 542 and the Supremacy Clause. All of the counts in the complaint boiled down to a claim of discrimination against the cable television medium, and that is the essence of the arguments on appeal, although they are segmented as was the complaint.

1. Public rights of way

In his order ruling against the taxpayers, the chancellor distinguished the cable medium from others on the ground that it required use of a public right of way in addition to the fact that there are no gross proceeds to be taxed in the case of, for example, broadcast television. There was uncontradicted testimony to the effect that a cable television enterprise pays a franchise fee for the use of the right of way. It is true that the use of public rights of way by cable television may subject it to more regulation as has been suggested in some cases. *See City of Los Angeles v. Preferred Communications, Inc.*, ____ U.S. ____, 106 S.Ct. 2034, 90 L.Ed. 480 (1986); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 714 (8th Cir. 1986); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981). However, those cases involve regulation related to access to or use of the rights of way rather than a tax which has no relationship to the acquisition of the privilege of using public property. We thus find the fact that cable television uses public property and must obtain a franchise to do so should not control the result in this case.

2. The First Amendment

We need not indulge in a long explanation of the history of cable television and the cases which have gradually recognized the entitlement of such enterprises to First Amendment protection. A good discussion of it is found in *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985).

The Supreme Court has left no doubt about the matter. In *City of Los Angeles v. Preferred Communications, Inc.*, *supra*, it was held that the complaint of a cable television company alleging violation of the company's rights guaranteed by the First Amendment should not have been dismissed for failure to state a claim upon which relief could be granted. The court made it clear that the complaint implicated the First Amendment and facts should be developed to determine how to balance the First Amendment protection to which a cable television company was entitled against the city's right to regulate the company's use of public property.

3. Discrimination.

Entitlement to protection under the First Amendment does not mean entitlement to absolute freedom from regulation by the government. *U.S. v. O'Brien*, 391 U.S. 367 (1968). If a tax is to be applied to an enterprise entitled to First Amendment protection, it must be a general tax and must not be a form of censorship. In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), Louisiana was held to have violated the First Amendment by imposing a tax on newspapers circulating more than 20,000. The court recognized that the press may be subjected to taxation but not if the tax is discriminatory and functions as a censor of some newspapers but not others.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), it was held that a

Minnesota use tax on ink and paper purchases over $100,000 was invalid because its impact was on a few newspapers and one in particular. Unlike the *Grosjean* case, there was no direct implication of censorship, but the tax was found to discriminate among newspapers and thus to be invalid. The Supreme Court again recognized, however, that the press is subject to a general, nondiscriminatory tax.

In *Arkansas Writers' Project v. Ragland*, ____ U.S. ____, 107 S.Ct. 1722, 95 L.Ed. 209 (1987), the Supreme Court held that a tax which was applied to some, but not other, magazines sold in Arkansas was in violation of the First Amendment.

In none of the cases we have discussed above, and in none of the other cases cited to us, do we find the Supreme Court holding that, for example, the failure to tax newspapers in the same manner as radio broadcasts violates the First Amendment. Each of the cases involved discrimination among competing mass communicators, each of whom was entitled to First Amendment protection. The taxpayers argue here that cable television is entitled to exemption from the sales tax because newspaper sales are not taxed and subscription magazine sales are not taxed. They would like us to issue a ruling which would invalidate not only Act 188 but, in effect, Act 769 as well. We decline to do so. As noted above, Act 769 was not before the court in this case, and we are unwilling to hold that all mass communications media must be taxed in the same way. It would be impossible to impose a tax which would have the same effect on broadcast television, the delivery of which produces no direct "gross proceeds," and cable television. We must, however, hold that a tax which discriminates between mass communicators delivering substantially the same service runs afoul of the First Amendment and the cases which prohibit discriminatory taxation among the purveyors of a particular medium.

Act 188 levied a tax on cable television enterprises but did not tax the proceeds resulting from the "unscrambling" of satellite signals. The similarity of the services is demonstrated in the testimony of Paul Gardner, Jr., president of the Arkansas Cable Television Association. He testified that his company offered both cable service and decoders for "unscrambling" satellite television broadcasts which a viewer using a satellite dish could not otherwise receive. He testified that his company charged the same to a cable viewer for the premium HBO channel, for example, as it charged a satellite viewer. Act 188 thus imposed a tax which cannot pass First Amendment muster, and we must remand this case to the chancellor for orders consistent with this opinion.

Reversed and remanded.

Dudley, J., not participating.

APPENDIX C

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers — PLAINTIFFS

vs. — No. 87-2401

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; and all other similarly situated counties and cities — DEFENDANTS

CITY OF FAYETTEVILLE, ARKANSAS — INTERVENOR

ORDER AND JUDGMENT

Based upon the Opinion containing this Court's findings of fact and conclusions of law entered in this cause on March 10, 1989, wherein this Court determined that Act 188 of 1987 [Ark. Code Ann. §26-52-301(3)(D)] is constitutionally valid, both facially and in its application, as

against the First Amendment and Equal Protection challenges of plaintiffs; and

Based upon the further findings by this Court that said law is a valid exercise of the State's police power and does not violate Article 2 Section 18 of the Arkansas Constitution or any provision of the Cable Communications Policy Act of 1984;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' complaint be dismissed; that the Preliminary Injunction entered in this case on August 28, 1987 be and is hereby dissolved; that all funds previously required herein to be deposited into an interest-bearing escrow account now be released; and that all escrow requirements and other restrictions previously imposed herein against defendants be and are hereby dissolved and removed.

ENTERED this 13 day of March, 1989.

/s/ Lee A. Munson
Lee A. Munson
Chancellor

APPENDIX D

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers — PLAINTIFFS

vs. — No. 87-2401

JAMES C. PLEDGER, Commissioner of Revenues; JIMMIE LOU FISHER, Treasurer of the State of Arkansas; DONALD VENHAUS, County Judge, Pulaski County, Arkansas; PATRICIA TEDFORD, Treasurer, Pulaski County, Arkansas; PULASKI COUNTY, ARKANSAS; JOANN BOONE, Treasurer, City of Benton, Arkansas; THE CITY OF BENTON, ARKANSAS; and all other similarly situated counties and cities — DEFENDANTS

CITY OF FAYETTEVILLE, ARKANSAS — INTERVENOR

OPINION

From the evidence introduced at the hearing on plaintiff's motion for preliminary injunction, the evidence introduced at trial, as well as the arguments and authorities cited by the parties in their briefs, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 (a) of the Arkansas Rules of Civil Procedure:

FINDINGS OF FACT

1. Plaintiffs in this action are Daniel L. Medlock, a citizen of Pulaski County, Arkansas, and a subscriber to cable television services. Community Communications Company, is an Arkansas corporation which operates 6 separate cable television systems in south Arkansas at Monticello, Warren, Arkansas City, Eudora, Tillar/Reed and East Camden. The Arkansas Cable Television Association, Inc. is a trade organization composed of 80 of the approximate 100 cable television system operators in the State of Arkansas.

2. The defendants are James C. Pledger, the Commissioner of Revenues and the person charged with collecting the state and local sales taxes in question each month from the individual cable operators. Jimmie Lou Fisher is the Treasurer of the State of Arkansas and is the person charged with receiving all collected state and local sales tax monies from the Commissioner of Revenues and then distributing such state sales taxes to the respective agencies under the Revenue Distribution Act and all local sales taxes to the respective counties and cities in the State of Arkansas wherein a local sales tax has been imposed. Donald Venhaus and Particia Tedford are, respectively, County Judge and Treasurer of Pulaski County, Arkansas. Pulaski County, Arkansas is one of approximately forty-two counties wherein a county wide local sales tax was imposed as of the time of trial. Joann Boone is the Treasurer of the City of Benton, Arkansas, and the City of Benton, Arkansas is one of approximately eighty municipalities within the State of Arkansas wherein a local municipal sales tax is imposed.

3. Testimony at trial established that there are approximately one hundred cable system operators providing cable television services in the State of Arkansas to approximately four hundred thousand separate

subscriber-customers. These systems vary in size from only a few one hundred subscriber-customers up to one system in Pulaski County, Arkansas with sixty-five thousand subscriber-customers.

4. These cable television system operators provide cable television service to their subscriber-customers in return for a monthly subscription fee. There are generally several levels of service provided, with additional charges being made by the operators for greater levels of service or what are generally referred to as "premium channels" or "pay channels."

5. The evidence at trial established that there are more programming services available to cable operators than can be carried on most cable systems in Arkansas. Witnesses who operated cable television systems in the State of Arkansas testified that they were constantly reviewing the choice of programming to be offered to their customer-subscribers. Specifically, Mr. Gardener, the owner and operator of Community Communications Company testified that in his six cable systems there was no exact uniformity of the programming offered. Instead, though each of his six cable systems offered some of the same programming, he chose to make some programming different in each system because of the particular interests of the individual subscribers in each of the systems.

6. Evidence introduced by plaintiffs' witnesses at the various hearings in this case has established that cable television system operators in the State of Arkansas make a variety of programming available to their subscriber-customers. Some of the programming is a retransmission of original works by others, while some of the programming is actually originated by the cable television system operator or is a cable casting of programming produced specifically for cable television system distribution in Arkansas.

7. The "cable casting" by cable television system operators provides Arkansans with a variety of programming which presents a mixture of news, information and entertainment. This programming seeks to provide a wide variety of topics and formats, including regular news and entertainment programming, public access channels, public announcements and electronic bulletin board.

8. The plaintiffs introduced a two-minute video tape of examples of programming produced exclusively for cable television distribution in the State of Arkansas. Such programming including agricultural service reports, policy commentary on the State Legislature's activities, industrial incentive programming and educational training, in addition to a variety of entertainment programming offered by cable television operators.

9. The owner-operators of two cable systems as well as the Executive Director of the Arkansas Cable Television Association, Inc. testified that they considered cable television programming to be the equivalent of "an electronic magazine".

10. The operator of one small system testified that his system even provided an electronic billboard service where his system's customer-subscribers could send messages (for example birthday greetings) to other customers of the same system. The operator of Community Communications Company testified that his cable systems generated some original programming. The company system at Warren, Arkansas cable cast the City Council and school board meetings, the local high school football games, and coverage of the Warren Pink Tomato Festival.

11. Since 1941, Arkansas has imposed a general sales tax upon the gross proceeds derived from the sale of all tangible personal property and from the sale of certain services. Ark. Code Ann. §26-52-101, et seq. Since late 1981,

Arkansas' counties and cities have been able to enact local option sales taxes that apply to the sales of the same goods and services as does the state sales tax. These local taxes may be imposed upon a county wide basis or only within the borders of one municipality. These local sales taxes are collected and administered by the Commissioner of Revenues in the same manner as he administers the State sales taxes. As of the time of trial, approximately forty-two counties and over eighty municipalities in Arkansas imposed these local sales taxes upon the sale of the same goods and services that are taxed by the State sales tax laws.

12. Mahlon Martin, the Director of the Arkansas Department of Finance and Administration, testified that the State of Arkansas had never prior to July 1, 1987 attempted to subject the charges made by cable operators to State and local sales taxes.

13. Act 188 of 1987 was signed into law by Governor Clinton on March 12, 1987, to be effective on July 1, 1987. Act 188 of 1987 [Ark. Code Ann. §26-52-301 (3) (D)] provides as follows:

> There is levied an excise tax of three percent (3%)
> upon the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> (D) Service of cable television provided to subscribers or users including all service charges and rental charges, whether for basic service of premium channels or other special service, and including installation and repair service charges and any other charges having any connection with the providing of cable television services.

14. The Manager of the Sales & Use Tax Section of the Revenue Division testified that July 1, 1987 was the first time that the State of Arkansas had ever attempted to

impose the State and local sales taxes upon charges for cable television services.

15. On the passage of Act 188 of 1987, the Revenue Division of the Arkansas Department of Finance and Administration notified all cable television system operators in the State of Arkansas that they would have to register with the Sales & Use Tax Section, secure Sales Tax Permit Numbers, and begin to collect and remit the applicable state and local sales taxes imposed in their respective communities on cable television services provided on or after July 1, 1987. One cable television system operator testified that his company acted as a collecting agent for scrambled satellite television broadcast system charges in his area. The owner of Community Communications Company testified that his company also acted as collecting agent for scrambled satellite broadcast services in his area and that he invoiced his customer-subscribers for both cable television system services and scrambled satellite television broadcast services approximately the same amount each month. This operator testified that he applied the state and local sales taxes only to the charges made to the delivery of services by his cable system, while not applying the tax to the charges made by his company for delivery of television services by scrambled satellite television broadcast directly to the subscriber-customer's own "earth station".

16. Cable television enjoys universal access to the homes of subscriber-customers and requires use of public ways for provision, maintenance and repairing of its property and services. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Circuit 1986).

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction over this controversy pursuant to the provisions of Article 16, Section 13 of the Arkansas State Constitution. The Court

also has personal jurisdiction over each of the parties to this case.

2. Cable television operations are covered by the First Amendment to the Constitution of the United States. The First Amendment privileges apply to both the cable television system operators and to the cable television system subscriber's right to receive cable programming.

3. Though the United States Supreme Court has not specifically ruled upon the extent of First Amendment Protective Rights afforded to cable television, the Court in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 474 U.S. ____, 106 S.Ct. 2034 (1986), recognized that cablecasting is to be afforded First Amendment protected rights. There, in a case involving the cable operators attack upon the City of Los Angeles' refusal to grant it a non-exclusive franchise to operate, the Supreme Court held:

> We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges:
>
> > The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communication of others, while at the same time providing some original content. App. 3A
>
> Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently

noted that cable operators exercise a "significant amount of editorial discretion regarding what their programming will include." *FCC v. Midwest Video Corp.*, 440 U.S. 698, 707, 99 S.Ct. 1435, 1445 (1979). Cable television partakes of some of the aspects of speech and the communication of ideas as to the traditional enterprises of newspapers and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment in *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S., at 386, 89 S.Ct. 1804, even though free speech aspects of the wireless broadcasters' claim were found to be outweighed by the government interest in regulating by reason of the scarcity of frequencies.

4. This Court must determine the extent of First Amendment Protected Rights of cable television. The First Amendment provides that "Congress shall make no laws . . . abridging the freedom of speech . . . or the press". The United States Supreme Court, in the case of *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 49 S.Ct. 2831 (1974), held that the State of Florida could not pass a law requiring a newspaper to provide, free of cost, space for rebuttal by a political candidate that had been denounced by the newspaper in an editorial. The Supreme Court recently ruled, in the case of *City of Lakewood v. Plain Dealer Publishing Company*, 108 S.Ct. 2138 (1988) that a city, by ordinance, could not ban the newspapers' right to place coin operated distribution boxes upon the streets of the city simply because such racks or boxes interfered with the aesthetic qualities of the city's neighborhoods.

5. Early on in the development of the wireless broadcast of radio and television, the Courts established that both of these mediums were entitled to claim First Amendment Protected Rights. However, even though they

enjoyed First Amendment Protections, the Supreme Court ruled that access to these mediums could be controlled in spite of the First Amendment protected guarantees because governmental interests were served by the allocation of a limited number of broadcast frequencies that are technically available.

6. Based upon the evidence submitted in this case and upon decisions of Federal Courts interpreting the extent of First Amendment Protected Rights to be afforded cable television system operations, the Court must conclude that cable television system operators and subscribers are not entitled to claim the broader First Amendment Protected Rights afforded to the print media. The Eighth Circuit Court of Appeals in *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 Fed. 2nd 711 (8th Circuit 1986), determined that more governmental regulation of the cable medium may be permissible because, among other things, cable requires use of public ways and enjoys universal access to the home. The Court relied for its decision upon the United States Supreme Court's opinion in *Los Angeles v. Preferred Communications, Community Communications v. City of Boulder*, 660 F.2nd 1370 (10th Circuit 1981), and *Omega Satellite Products v. City of Indianapolis*, 694 F. 2nd 119 (7th Circuit 1982). The Eighth Circuit in *Central Telecommunications, Inc.* also determined that different communications media can be treated differently for First Amendment purposes.

7. Unquestionably, a State may subject any business entity that is afforded First Amendment Protected Rights to taxes imposed by the State. However, similarly situated entities must be treated the same. The Court finds that cable television programming requires a cable systems use of public property, which along with the distinct and unique benefits gained by cable from use of that property, distinguishes for constitutional purposes cable television from other communications media. The same is true in comparing cable television to wireless television or radio

broadcasting, in addition to the fact that there are no "gross receipts or gross proceeds" generated by wireless television or radio broadcasting on which the State sales tax could be imposed.

8. In the case of *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 36 (1987) the United States Supreme Court was faced with the question of the discriminatory applicability of Arkansas' sales tax. There, because the proceeds realized from the sale of certain magazines of a special content were exempted from Arkansas' sales tax, while other general interest magazines were subjected to the sales tax, the Supreme Court specifically held:

> "The Arkansas sales tax cannot be characterized as nondiscriminatory because it is not evenly applied to all magazines."

In that case, the Supreme Court held that the general sales tax was discriminatory because it was targeted at only a small group of magazines. Such case does not adversely affect the tax at issue in the present case. Arkansas' general sales tax is evenly applied to all cable television services and operations and is content-neutral. No small group of cable television operators is targeted by the tax. The same factual considerations make the specific ruling in *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenues*, 103 S.Ct. 1365 (1983) inapplicable to the facts of the present case. No "special" tax is involved in the case at bar, nor does the tax operate unevenly on cable television operators or services. The extension of Arkansas' general sales tax to charges for cable television service was not an attempt to single out a business entity claiming First Amendment protected rights. The general sales tax applies to sales of tangible personal property and a variety of sales of services.

9. The case of *U.S. v. O'Brien*, 391 U.S. 367 (1968) establishes the test for determining whether governmental

regulation is sufficiently justified under the First Amendment. The Court there held that:

> 1. The regulation must be within the constitutional power of the government;
> 2. The regulation must further an important or substantial interest;
> 3. The regulation must be unrelated to suppression of free expression;
> 4. Any incidental restriction of First Amendment Freedoms must be no greater than necessary to furtherance of the governmental interest.

The raising of revenue is an important or substantial governmental interest. It has never even been argued that the tax on sales of cable television service is suppressive of free expression. It has never been questioned that the power to tax is within the constitutional power of the government. Finally, the tax on sales of cable television service goes no further than is necessary to achieve the important or substantial governmental interest.

10. Based upon the evidence presented in this case and the applicable law, this Court finds that the plaintiffs challenge is not well taken and should be denied. The statutory scheme of state and local sales taxation at issue does not discriminatorily apply the sales tax, nor is there any "facial" discrimination.

11. Because the Court has decided that the challenged sales taxes are constitutionally valid, the Court dismisses plaintiffs' First Amendment claims. The plaintiffs' Equal Protection claims are also denied, because the sales tax is rationally related to a legitimate governmental interest. That is the test prescribed by *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), and the test has been passed in this case.

Entered this 10 day of March, 1989.

/s/ Lee A. Munson

Lee A. Munson
Chancellor

APPENDIX E

Selected Portions of the Arkansas Gross Receipts [Sales] Tax Act of 1941 (as in effect on January 1, 1990)

26-52-101. Title

This act shall be known and cited as the "Arkansas Gross Receipts Act of 1941."

* * *

26-52-301. Tax Levied.

There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

(1) Tangible personal property;

(2) Natural or artificial gas, electricity, water, ice, steam, or any other utility or public service except transportation services, sewer services, and sanitation or garbage collection services;

(3) (A) (i) Service by telephone, telecommunications, and telegraph companies to subscribers or users, including transmission of messages or images, whether local or long distance.

* * *

(B) Service of furnishing rooms by hotels, apartment hotels, lodging houses and tourist camps or courts to transient guests; the term "transient guests" being defined for the purpose hereof as those who rent accommodations other than their regular place of abode on less than a month-to-month basis.

(C) (i) Service of alteration, addition, cleaning, refinishing, replacement, and repair of motor vehicles, aircraft, farm machinery and implements, motors of all kinds, tires and batteries, boats, electrical appliances and devices, furniture, rugs, upholstery, household appliances, television and radio, jewelry, watches and clocks, engineering instruments, medical and surgical instruments, machinery of all kinds, bicycles, office machines and equipment, shoes, tin and sheetmetal, mechanical tools, and shop equipment.

* * *

[Subparagraph (D) below is as amended by Act 188 of 1987 and effective for periods from July 1, 1987, through June 30, 1989.]

(D) Service of cable television provided to subscribers or users including all service charges and rental charges, whether for basic service or premium channels or other special service, and including installation and repair service charges and any other charges having any connection with the providing of cable television services.

[Subparagraph (D) below is as amended by Act 769 of 1989 and effective for periods after July 1, 1989.]

(D) (i) Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services.

(ii) The tax levied by this section does not apply to services purchased by radio or television companies for use in providing their services.

(4) Printing of all kinds, types, and characters, including the service of overprinting, and photography of all kinds;

(5) Tickets or admissions to places of amusement; to athletic, entertainment, or recreational events; or fees for the privilege of having access to or the use of amusement, entertainment, athletic, or recreational facilities including free or complimentary passes and tickets, admissions, dues, or fees, with such free or complimentary passes, tickets, dues, or fees being declared to have a value equivalent to the sale price of tickets, passes, admissions, fees, or dues of like kind or character.

* * *

26-52-401. Exemptions for various products and services.

There is specifically exempted from the tax imposed by this act the following:

* * *

(4) Gross receipts or gross proceeds derived from the sale of newspapers;

* * *

(13) Gross proceeds derived from sales of advertising space in newspapers and publications and billboard advertising services;

(14) Religious, professional, trade, and sports journals and publications printed and published within this state and sold through regular subscriptions;

* * *

APPENDIX F

Selected Portions of the Arkansas Compensating [Use] Tax Act of 1949 (as in effect on January 1, 1990)

26-53-101. Title.

The title of this subchapter shall be cited as the "Arkansas Compensating Tax Act of 1949."

* * *

26-53-106. Imposition and rate of tax generally - Presumptions.

(a) There is levied and there shall be collected from every person in this state a tax or excise for the privilege of storing, using, distributing, or consuming within this state any article of tangible personal property purchased for storage, use, distribution, or consumption in this state at the rate of three percent (3%) of the sales price of the property.

(b) This tax will not apply with respect to the storage, use, distribution, or consumption of any article of tangible personal property purchased, produced, or manufactured outside this state until the transportation of the article has finally come to rest within this state or until the article has become commingled with the general mass of property of this state.

(c) This tax shall apply to use, storage, distribution, or consumption of every article of tangible personal property, except as provided in this subchapter, irrespective of whether the article or similar articles are manufactured within the State of Arkansas or are available for purchase within the State of Arkansas and irrespective of any other condition.

(d) (1) For the purpose of the proper administration of this subchapter and to prevent evasion of the tax and the duty to collect the tax imposed in this section, it shall be presumed that tangible personal property sold by any vendor for delivery in this state or transportation to this state is sold for storage, use, distribution, or consumption in this state unless the vendor selling the tangible personal property has taken from the purchaser a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale.

(2) It is further presumed that tangible personal property shipped, mailed, expressed, transported, or brought to this state by the purchaser was purchased from a vendor for storage, use, distribution, or consumption in this state.

APPENDIX G

ACT 188 1987
A Bill

State of Arkansas
76th General Assembly
Regular Session, 1987
By: Representative Lipton HOUSE BILL 1784

For An Act To Be Entitled

"AN ACT TO AMEND SUBSECTION (c) OF SECTION 3 OF ACT 386 OF 1941, AS AMENDED, [ARK. STATS. ANN. §84-1903(c)] TO IMPOSE THE ARKANSAS GROSS RECEIPTS TAX UPON CABLE TELEVISION SERVICES; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Subsection (c) of Section 3 of Act 386 of 1941, as amended, the same being Arkansas Statutes Ann. §84-1903(c) is hereby amended by adding the following paragraph (4) at the end thereof:

"(4) Cable television services provided to subscribers or users. This shall include all service charges and rental charges whether for basic service or premium channels or other special service, and shall include installation and repair service charges and any other charges having any connection with the providing of cable television services."

SECTION 2. All laws or parts of laws in conflict with this Act are hereby repealed.

SECTION 3. It is hereby found and determined by the General Assembly that the State of Arkansas is in serious

danger of losing revenues which are necessary to provide adequate funding for schools and other essential services required by the citizens of this State and the provisions of this Act are necessary to avoid a substantial reduction in State revenues. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect on and after July 1, 1987.

APPROVED BY /s/ Bill Clinton
GOVERNOR

3/12/87

APPENDIX H

ACT 769 1989
AS ENGROSSED 3/2/89

A Bill

State of Arkansas
77th General Assembly
Regular Session, 1989
By: Representative McGinnis HOUSE BILL 1800

For An Act To Be Entitled

"AN ACT TO AMEND SECTION 26-52-301(3) (D) OF THE ARKANSAS CODE OF 1987 ANNOTATED TO EXPAND THE APPLICATION OF THE GROSS RECEIPTS TAX TO ALL TELEVISION, VIDEO AND RADIO SERVICES PROVIDED TO SUBSCRIBERS AND CUSTOMERS; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Section 26-52-301(3) (D) of the Arkansas Code of 1987 Annotated is hereby amended to read as follows:

"(D) Service of cable television, community antenna television and any and all other distribution of television, video or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services. *The tax levied by this section does not*

apply to services purchased by radio or television companies for use in providing their services."

SECTION 2. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 3. All laws and parts of laws in conflict with this Act are hereby repealed.

SECTION 4. It is hereby found and determined by the General Assembly that the State of Arkansas is in serious need of additional revenue for the purpose of funding critical education programs and other essential services required by the citizens of the state and the provisions of this act are necessary to raise needed revenue. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect on and after July 1, 1989.

/s/ B. McGinnis

APPROVED BY /s/ Bill Clinton
GOVERNOR

3-21-89

No. 90-38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS ..... *Petitioners*

vs.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; AND ALL OTHER SIMILARLY SITUATED COUNTIES AND CITIES ..... *Respondents*

CITY OF FAYETTEVILLE, ARKANSAS ..... *Intervenor*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITY OF FAYETTEVILLE, ARKANSAS ..... *Intervenor*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Petitioners have stated that a conflict exists between the decision of the Supreme Court of Arkansas in this case and decisions of other state and federal appellate courts regarding the First Amendment standards to be applied to cable television, and that the decision of the Arkansas court is erroneous. This conclusion is based upon a very broad reading of cases issued by this Court and by other federal court decisions. Arkansas' differing sales tax treatment of the print and cable media is justified by important or substantial interests, not the least of which are increasing revenues for the education of Arkansas' children and to meet the needs of the state's citizenry. Further, the fact that Arkansas has no compensating use tax upon the service of descrambling satellite television signals is also not helpful to Petitioners' First Amendment position because the compensating tax statutes do not apply to any services.

The Petitioners have also alleged that Act 769 of 1989 violates their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. This legislation, when viewed under the "rational basis" test, survives this constitutional challenge. Therefore, there is adequate delineation of the First Amendment rights of cable television, and Petitioners' Petition should be denied.

REASONS FOR DENYING THE WRIT

I.

FIRST AMENDMENT CONSIDERATIONS

The Petitioners have stated that there is a real conflict between the Supreme Court of Arkansas' application of the First Amendment test enunciated by this Court in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenues*, 460 U. S. 575, 75. L.Ed.2d 295, 103 S.Ct. 1365 (1983) and *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 95 L.Ed.2d 209, 107 S.Ct. 1722 (1987), and similar decisions by other state and federal appellate courts. In *Minneapolis Star*, this Court repeatedly emphasized that the case dealt with the press, and struck down the tax at issue there because it singled out the press, and because it targeted a small group of newspapers. This Court stated:

> "When the state singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." (75 L.Ed.2d at 304-305)

Similarly, in *Arkansas Writer's Project*, this Court held that because the tax in question targeted only a small group "within the press" and, more repugnantly, was imposed on the basis of a publication's content, the tax must be declared invalid. Both of these cases, as well as *Louisiana Life, Ltd. v. McNamara*, 504 S.2d 900 (La. App. 1st Div., 1987), cited by

Petitioners at page 14 of their Petition, turned on the fact that a tax which "singles out the press" violates the right of freedom of the press guaranteed by the First Amendment. Cable television is not a part of the press which *Minneapolis Star*'s historical narrative emphasized as being worthy of the highest degree of protection. Cable television is entitled to a degree of free speech protection under the First Amendment, but it has not historically been accorded the heightened degree given to the press, the collective body of printed publications.

Even if it were established that cable television was entitled to the same degree of protection as the press, the tax at issue in the present case withstands constitutional challenge. There is no "singling out" of cable television. Ark. Code Ann. § 26-52-301(3)(D)(i) (Supp. 1989), cited by Petitioners at pages 24a and 25a of their Petition, imposes sales tax on cable television service as a part of the state's general scheme of sales tax imposition. Cable television is one of many services and products subject to the state's general tax levied upon the gross receipts derived from sales of those services and products. The same general sales tax is applied to sales of utilities services, books and magazines sold at retail, admissions to movie theaters, sales and rentals of videotaped movies and documentaries, and many other products and services. No special tax is involved; cable television is not "singled out"; and no group of cable service providers is targeted any differently than another. The tax applies evenly to all cable television service. Moreover, it is not even argued by Petitioners that the infirmity so apparent in *Arkansas Writer's Project* is present in the case at bar. Content-based discrimination, which has been deemed so offensive to the First Amendment, is not an issue in the present case.

U.S. v. O'Brien, 391 U.S. 367, 20 L.Ed.2d 672 (1968), cited by Petitioners at page 16 of their Brief, clearly held that governmental regulation is justified under First Amendment review if:

> (1) The regulation is within the constitutional power of the government;
>
> (2) The regulation furthers an important or substantial interest;
>
> (3) The regulation is unrelated to suppression of free expression; and
>
> (4) Any incidental restriction of First Amendment freedoms is no greater than necessary to further the governmental interest. (20 L.Ed.2d at 680).

The same standard was applied in *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N. D. Cal. 1987), and *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D. C. Cir. 1977), two other cases cited by Petitioners. Does the sales tax on cable television service pass the *O'Brien* test? The answer is clearly yes. The placement of cable television service within the general sales tax base goes no further than necessary to advance the "important or substantial interest" of raising revenue to provide for the education of Arkansas' children and to meet the needs of its citizens. The Supreme Court of Arkansas in this case determined that for tax purposes sales of "scrambled" satellite television broadcast subscription services and sales of cable television service should be treated similarly. Although this Respondent has challenged this finding (*Pledger v. Medlock et al.* Supreme Court of the United States, docket number 90-29), the General Assembly

of the State of Arkansas chose to provide equal tax treatment of those services. This treatment is provided in Act 769 of 1989, which Petitioners cite at pages 24a and 25a of their Petition (Appendix E). The Emergency Clause of this Act states:

> "It is hereby found and determined by the General Assembly that the State of Arkansas is in serious need of additional revenue for the purpose of funding critical education programs and other essential services required by the citizens of the state and the provisions of this act are necessary to raise needed revenue. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect on and after July 1, 1989."

Petitioners contend that the raising of revenue is not an interest which will satisfy the *O'Brien* test. Petitioners' formula would require tht a compelling interest be exhibited by the government. The showing of a compelling interest is not required in this case. *O'Brien* expressly states that a governmental regulation must further an "important or substantial interest." Petitioners' chief authority, *Minneapolis Star*, recognized that raising of revenue is an "interest [which] is critical to any government." 460 U.S. at 586. Surely an interest which is "critical" meets the criterion of "important or substantial." The Court in *Minneapolis Star* acknowledged the importance of such interest; it simply determined that even such an important interest could not support a special tax on ink and paper which was levied against only one newspaper. Likewise, the Court in *Arkansas Writer's Project* stated:

> "The Commissioner . . . asserts the state's general

> interest in raising revenue. While we have recognized that this interest is an important one, . . . it does not explain selective imposition of the sales tax on some magazines and not others, based solely on their content. (107 S.Ct. at 1722)

In the present case there is no selective imposition of sales tax on some cable television systems and not others. There is certainly no selective imposition based on content of programming. Therefore, the recognized important interest of raising revenue is sufficient, and the *O'Brien* test is fully satisfied.

As stated by the Supreme Court of Arkansas in *Streight v. Ragland* 280 Ark. 206, 655 S.W.2d 459 (1983), all legislative enactments are presumed to be constitutionally valid. The legislature has broad discretion in creating classifications for taxation purposes. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F. 2d 711 (8th Cir. 1986); *Times Mirror Co. v. City of Los Angeles*, 237 Cal. Rptr. 346 (1987). The court in the *Times Mirror* case also stated that a tax which is neither special nor unique is a valid legislative enactment even though it incidentally impacts upon First Amendment activities. Finally, that Court recognized the power of the legislature to enact taxes "in order to generate revenue so long as those laws operate evenhandedly upon all similarly situated." 237 Cal. Rptr. at 351. The *Times Mirror* Court specifically determined that its decision was consistent with *Minneapolis Star, Arkansas Writer's Project*, and *City of Alameda v. Premier Communications Network, Inc.*, 202 Cal. Rptr. 684 (Cal. App. 1984), all cases relied upon by Petitioners.

Cable television is not "similarly situated" when compared to any other medium. Its use of and impact upon

public ways distinguishes it from all broadcast and print media, and its enjoyment of virtually unlimited access to households puts it in a different class than the press. *Omega Satellite Products v. City of Indianapolis, Inc.*, 694 F.2d 119 (7th Cir. 1982). Cable television simply cannot be equated with any other entity for purposes of the "similarly situated" formula. It has a very real impact upon public ways and is of a character completely dissimilar to the press. Further, although this Respondent disagrees with the finding of the Supreme Court of Arkansas that the service of descrambling satellite television signals is similarly situated to cable television service, the Arkansas General Assembly in enacting Act 769 of 1989 corrected the only alleged defect found by the court to exist.

Both the Supreme Court of Oklahoma, in the case of *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 p. 2d 1312 (Okla. 1990), and the intermediate New York appellate court, in the case of *McGraw-Hill, Inc. v. State Tax Commission* (App. Div. 3 Sept., 1989), affirmed and adopted, 252 N.E.2d 163 (N.Y., 1990), in dismissing the important distinction between cable television and the other media, have gone too far in attempting to construe *Minneapolis Star* and other above-cited cases to read in favor of Petitioners' position.

Another portion of Petitioners' First Amendment argument addresses the fact that Act 769 of 1989 did not amend the Arkansas Compensating Tax Act (cited by Petitioners at Appendix F, page 26a) to impose the tax on the service of descrambling satellite television signals. The Arkansas compensating tax is levied on the privilege of storing, using, distributing, or consuming within the state any article of tangible personal property purchased for storage, use, distribution, or consumption in the state. The

problem with this part of Petitioners' argument is that the compensating tax, unlike the gross receipts (sales) tax, was not previously levied on the sale of cable television service. The very nature of the gross receipts tax makes it applicable only to transactions between a buyer and seller within the State of Arkansas. By definition, the compensating tax was and is not applicable to *any* service. Therefore, the Petitioners' argument in this regard is without merit.

II.

FOURTEENTH AMENDMENT CONSIDERATIONS

The Petitioners have also alleged that Act 769 of 1989 violates their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. In *Streight v. Ragland,* 655 S.W.2d 459, it was determined by the Supreme Court of Arkansas that state tax legislation should be reviewed under the "rational basis" test. The parties who attacked the tax legislation in *Streight* urged the Arkansas Supreme Court to abandon the rational basis test. In refusing such position the Court held:

> "Under the rationality standard of review, we must presume the legislation is constitutional, i.e. that it is rationally related to achieving a legitimate governmental objective. This presumption we indulge locates the burden of proof. It imposes upon the party against whom it is directed the burden of proving the unconstitutionality of the legislation, i.e. that the act is not rationally related to achieving any legitimate objective of state government under any reasonably conceivable state of facts . . . All tax measures usually involve some discrimination, . . . but these discriminations are not constitutionally impermissible as long as

> they are not arbitrary and are supported by a rational and legitimate basis . . . It is simply impermissible for us to evaluate the wisdom of legislation." (655 S.W.2d at 463-465)

The same facts which render cable television completely dissimilar to all other media provide more than sufficient support for subjecting sales of cable television service to the general sales tax. Cable's use of public ways and disruption of public order place it in a different class for both First Amendment and equal protection considerations. As stated by the very cases upon which Petitioners so heavily rely, *Minneapolis Star* and *Arkansas Writer's Project*, the governmental objective of raising revenue is important, indeed critical. An objective which is so described is obviously one which is legitimate. Therefore, the tax legislation at issue in the present case meets and surpasses the requirements of the rational basis test set forth in *Streight v. Ragland.*

No fundamental guarantee has been significantly diminished or curtailed by the tax legislation challenged by Petitioners. As a result, equal protection analysis requires no more than the application of the rational basis standard. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 49 L.Ed.2d 520, 96 S.Ct. 2562 (1976); *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973).

As held in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959):

> "The States have a very wide discretion in the laying of their taxes . . . The state may impose different specific taxes upon different trades and professions and may

> vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government." (358 U.S. at 526, 527)

Allied Stores made it clear that tax legislation is presumed to be rationally related to a legitimate governmental objective. The great deference given to a legislature in its exercise of discretion as to the levying of taxes is justified because it is the legislature which must determine which taxes are economically sound in order to raise revenue. If the legislature determines that collection of a tax would be unreliable or burdensome to the government as applied to a particular transaction, it may choose to exempt that transaciton in order to prevent economic waste. As stated by this Court in *Madden v. Kentucky*, 309 U.S. 83 (1940):

> "Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden." (309 U.S. at 88)

Imposition of the general sales tax upon sales of cable television service does not significantly burden any rights of Petitioners. Without significant diminishing or curtailment of a fundamental right, there can be no infringement of such right. *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, a case relied upon as authority by Petitioners, acknowledged:

> ". . . rules restricting speech do not necessarily abridge freedom of speech . . . Restriction becomes abridgement only when government seeks to limit speech

> because it is on one side of the issue rather than another, . . . or because it is thought unwise, unfair, false, or dangerous." (567 F.2d at 46, 47)

No First Amendment protection having been infringed, Petitioners cannot make some higher degree of scrutiny applicable to the present case. The presumption of rationality which attaches to all tax legislation cannot be overcome unless a challenger, such as Petitioners herein, proves that no conceivable rational objective could support the legislation. *Streight v. Ragland*, 655 S.W.2d 459. Appellants have not and cannot meet that burden of proof, and no infringement of any fundamental right has been proven by Petitioners.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioners' Petition for Writ of Certiorari filed herein.

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(3)

No. 90-38

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS
PETITIONERS

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; AND ALL OTHER SIMILARLY SITUATED COUNTIES AND CITIES
RESPONDENTS

CITY OF FAYETTEVILLE, ARKANSAS
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

REPLY BRIEF OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION

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No. 90-38

In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL L. MEDLOCK, Et. Al.
PETITIONERS

v.

JAMES C. PLEDGER, ET. AL.
RESPONDENTS

CITY OF FAYETTEVILLE, ARKANSAS
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

REPLY BRIEF OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION

The Petitioners will address separately below the major points raised by Respondent Pledger, Commissioner of Revenues, in his Brief in Opposition.

1. Cable television is entitled to claim the First Amendment guaranteed protections of free speech and free press.

The Respondent argues (Resp. Br. 3-4) that cable television operations are *not* covered by the First

Amendment's guaranteed right of *free press*, and that the heightened scrutiny (and resulting shift of the burden of proof) applied by the legal analysis in any case where a fundamental right is involved applies *only* to the "collective body of printed publications." Such a myopic view of what constitutes similarly situated businesses for First Amendment evaluation purposes was clearly rejected by this Court in its decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). There, the Court discussed and analogized the attributes of cable television operations and found that they were similar to those of other print and broadcast businesses, as well as certain First Amendment attributes of individual speakers. 476 U.S. at 494-495.

The evidentiary record in this case establishes that cable television is an integral, though separately identifiable, part of the mass communications media that is composed of numerous businesses engaged in *both* the electronic and print transmission of news, information and entertainment. The Oklahoma Supreme Court recently addressed this very issue and rejected the taxing agency's argument for a narrow application of this Court's First Amendment based test for state taxes. The Oklahoma Court recognized that *all* segments of the mass communications media are entitled to the same First Amendment protected rights of *free press* and *free speech* in its decision in *Oklahoma Broadcasters Association, Inc. v. Oklahoma Tax Commission*, 789 P.2d 1312, 1316 (Okla., 1990), where it held:

> Both *Minneapolis Star* and *Ragland* found *First Amendment* violations resulting from a differential tax scheme between different members of the press. Though both *cases* admittedly dealt with differential treatment among members of the *print* media, there is nothing to suggest that this court should, without sufficient justification, approve preferential treatment of the print media over the broadcast

media, where both are members of the press. The First Amendment guarantees freedom of the press -not just the *printed* press.

Thus, the Petitioners submit that the Respondent state tax administrator's argument that cable television is *not* entitled to claim the historic First Amendment guaranteed rights of *free press* and *free speech* should be rejected by this Court.

2. The raising of general revenue is not a sufficiently compelling reason to justify the discriminatory imposition of Arkansas' state and local Sales Tax on cable television services.

The Respondent argues here (Resp. Br. 4-7), as did his successor in office in *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987), that the raising of general revenues is "an interest which is *critical* to any government," and is therefore an interest that is sufficient to overcome the incidental burdens imposed upon the Petitioners' First Amendment rights by the discriminatory application of Arkansas' otherwise general Sales Taxes. The Respondent therefore argues that he has satisfied this Court's four part balancing of interest test that was adopted by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968).[1] The Respondent also indulges in what the Petitioners submit is a baseless semantic gyration by arguing that there is a difference between a *compelling* interest and an *important* or *substantial* interest, under this Court's four part balancing of interest test enunciated in *O'Brien*. There is no gradation of value between the use of

[1]The only reason given by the Arkansas General Assembly for imposing these state and local Sales Taxes upon cable television services through the enactment of Act 188 of 1987 is found in § 3 of that Act (Appendix G, p. 28a-29a). There, the Legislature stated the Act was passed "to avoid a substantial reduction in State revenues." This Court *specifically* considered and rejected this argument in both the *Minneapolis Star* and *Arkansas Writer's Project* cases by the tax administrators.

these words, as this Court specifically noted in *O'Brien*, 391 U.S. at 376-377:

> This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. *Whatever imprecision inheres in these terms*, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (Footnotes Omitted and Emphasis Added)

Thus, this Court places no special designation on the use of the word *compelling*, as opposed to *important* or *substantial*, in the implementation of this balancing of interests test.[2]

Though the Petitioners acknowledge that the raising of revenues is an interest that *is* critical to the operation of government, they submit that the raising of revenues by the discriminatory imposition of an otherwise general Sales

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[2]In fact, in the decision in *Minneapolis Star v. Minnesota Commissioner of Revenues*, 460 U.S. 575, 586 (1983), this Court liabled the interest that the government must establish in applying the *O'Brien* "balancing of interests" test to be "a counterbalancing interest of *compelling* importance that it cannot achieve without differential taxation." This Court went on to explicitly hold that the mere raising of general revenues was not sufficient to "justify the special treatment of the press."

Tax upon similarly situated First Amendment protected businesses engaged in the mass communications media is *not* a governmental interest that is sufficient to satisfy this Court's *O'Brien* test, as was held by the Arkansas Supreme Court in its decision in this case (Appendix B, pp. 6a-8a).

> **3. The fact that cable television makes a somewhat greater use of the public rights-of-way, than do other businesses involved in the mass communications media, does not justify the discriminatory imposition of the state and local Sales Taxes as the Respondent asserts.**

The Respondent argues (Resp. Br. 7-9) that the delivery of cable television service through the use of the public rights-of-way is a factor that distinguishes cable television from all other segments of the mass communications media and, because of this reason alone, makes cable television so unique that the discriminatory imposition of Arkansas' Sales Tax is justifiable. This argument by the Respondent was specifically rejected by the Arkansas Supreme Court (Appendix B, p. 5a), because cable television pays franchise fees to cover the "rental" of its use of the public rights-of-way. This Court should reject this argument for the same reasons.

It must be noted that even though the Respondent admits that there is a direct conflict between the decision of the Arkansas Supreme Court in this case, and the decisions of the Oklahoma Supreme Court in the *Oklahoma Broadcasters Association* case, *supra*, and the New York Court of Appeals in the case of *McGraw-Hill v. State Tax Commission*, 541 N.Y.S.2d 252 (App. Div. 3 Dept., 1989),

affirmed and adopted, 252 N.E.2d 163 (N.Y., 1990)[3] in applying the rationale or test of this Court's *Minneapolis Star* decision to similarly situated businesses involved in both the electronic and print segments of the mass communications media, he simply argues that the Oklahoma and New York courts "have gone too far in attempting to construe *Minneapolis Star* . . . ." The Petitioners submit that the converse of this argument is the one that should be adopted by this Court after a hearing on the merits, i.e. the Arkansas Supreme Court's *narrow* interpretation of the *Minneapolis Star* test has *not* gone far enough.

Petitioners submit that this Court should grant their Petition for Certiorari to decide the important First Amendment questions presented in this case for the benefit of businesses involved in the print and electronic segments of the mass communications media and the state taxing authorities throughout the country. A decision by this Court on this issue will eliminate the constitutionally approved difference that now exists in reality in the imposition of a sales (excise) tax upon the proceeds realized from the sale of cable television services to subscribers in Fort Smith, Arkansas (which sales are subjected to sales (excise) tax under the *Medlock* decision in this case) and in

---

[3]In responding to the state's argument that businesses involved in the electronic and print segments of the mass communications media are not "similarly situated," because they have different First Amendment rights, the New York Appellate Court held (541 N.Y.S.2d at 255):

> Given that there was a differential treatment between the print media and the broadcast media in this case, it was incumbent upon respondent to show that 20 NYCRR 4-4.3(f)(2) was necessary to serve a compelling State interest (*see, id.*). This, in our view, it did not do. Respondent claims that the unique nature of the electronic media makes it more susceptible to governmental regulation and that there are many differences between the print and visual media. While that may be true, such an argument fails to show any compelling State interest in taxing the two types of media differently. Thus, the regulation must fall.

the sales of the same cable television services in Poteau, Oklahoma (located just across the state line) (which sales would not be subjected to such sales (excise) taxes under the rationale of the *Oklahoma Broadcasters* decision). The Petitioners believe that all citizens of the United States should have their First Amendment rights of free speech and free press protected in the same manner with regard to the taxation of the purchase of cable television services, no matter in what state they reside.

4. The Petitioners' equal protection arguments have been subordinated to their First Amendment based arguments in this appeal.

In his Brief in Opposition (Resp. Br. 9-12), the Respondent alleges[4] that Petitioners have argued a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution in their Petition. Though the Petitioners raised an equal protection clause argument in their complaint in the trial court, their Petition for Certiorari in this appeal is based strictly upon their claim to the First Amendment rights of free speech and free press.[5]

Even if this Court should consider the proper basis of the Petitioners' claim in this case to be an equal protection based claim, rather than a First Amendment based claim, the Petitioners submit that the "heightened scrutiny" test that is applicable to a fundamental right (e.g. the right of

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[4]This argument is asserted by the Respondent tax administrator without making any reference whatsoever to the Petitioners' Petition for Certiorari. Petitioners submit that they have *not* directly raised a Fourteenth Amendment equal protection based claim in their Petition.

[5]This Court, in its *Minneapolis Star* decision, specifically held that the cause of action of the complaining taxpayer was being decided on First Amendment, not equal protection Fourteenth Amendment, based grounds. 460 U.S. at 587, ftnt. 7.

free speech or free press guaranteed by the First Amendment) would apply in this case in applying the equal protection clause, not the "rational basis" test suggested by the Respondent. Thus, the analysis that was utilized by the Illinois Appellate Court in *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988), in applying this Court's *Minneapolis Star* test to a challenged tax, would be the applicable one to use in this appeal, as opposed to the traditional "rational basis" test that this Court applied in the decision in the *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959).[6]

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[6]The Respondent's citation to the Arkansas Supreme Court's decision in the case of *Streight v. Ragland*, 655 S.W. 459 (1983), is inappropriate in this setting, inasmuch as that decision has absolutely no value as a precedent to this Court's consideration of the issues presented.

CONCLUSION

For reasons set forth above, the Petitioners submit that their Petition for Certiorari to the Arkansas Supreme Court should be granted so that this Court may settle a real conflict that presently exists between the highest appellate courts of several of the various states regarding this important question of the constitutionality of state taxes as the issue applies to businesses involved in both the electronic and print segments of the mass communications media.

Respectfully submitted,

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Nos. 90-29, 90-38 (9) (11)

In the

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. PLEDGER
PETITIONER
v.
DANIEL L. MEDLOCK, *et. al.*
RESPONDENTS
and
DANIEL L. MEDLOCK, *et. al.*
PETITIONERS
v.
JAMES C. PLEDGER, *et. al.*
RESPONDENTS

CONSOLIDATED CASES

On Writ of Certiorari to the Arkansas Supreme Court

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No. 90-29

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Printed as Appendix A, Petition for Certiorari, Docket No. 90-38, pg. 1a. 225

Order Granting and Consolidating Petitions for Certiorari in Docket Nos. 90-29 and 90-38 226

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

LIST OF OPINIONS AND ORDERS INCLUDED IN APPENDICES TO RESPECTIVE PETITIONS FOR CERTIORARI

The following opinions, decisions, judgments, orders and statutes have been omitted in printing this Joint Appendix because they appear on the following pages in either the printed Appendices to the Petition for Certiorari filed in *Pledger v. Medlock*, Docket No. 90-29 (Pledger Pet. Cert. App.) or in the printed Appendices to the Petition for Certiorari in the *Medlock v. Pledger*, Docket No. 90-38 (Medlock Pet. Cert. App.), as follows:

Document	Page
Opinion of Pulaski County Chancery Court (filed March 10, 1989)	
Pledger Pet. Cert. App. C	C-1
Medlock Pet. Cert. App. D	11a
Order and Judgment of Pulaski County, Arkansas, Chancery Court (filed March 13, 1990)	
Pledger Pet. Cert. App. B	B-1
Medlock Pet. Cert. App. C	9a
Opinion of Arkansas Supreme Court (filed February 28, 1990)	
Pledger Pet. Cert. App. A	A-1
Medlock Pet. Cert. App. B	3a
Order of Arkansas Supreme Court Denying Petitions for Rehearing (filed April 2, 1990)	
Pledger Pet. Cert. App. D	D-1
Medlock Pet. Cert. App. A	1a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Pulaski County, Arkansas, Chancery Court

DATE	PROCEEDINGS
	• • • •
1987	
July 16	[Plaintiffs'] Second Amended Complaint (with exhibit)
July 29	Defendant Ragland's [Commissioner of Revenues'] Answer to Second Amended Complaint
Aug. 4	Defendant Ragland's [Commissioner of Revenues'] Counterclaim
Aug. 4	Defendant Fisher's Answer to Second Amended Complaint
Aug. 5	Pulaski County Defendants' Answer to Second Amended Complaint
Aug. 14	Plaintiffs' Answer to Defendant Ragland's Counterclaim
Aug. 28	Order on Pending Motions [following hearing on Plaintiffs' Preliminary Injunction Motion]
Aug. 28	Preliminary Injunction [creating escrow account]
Aug. 28	Order for Certification as Class Action
Nov. 9	Defendant Pledger's Supplement to Answer to Second Amended Complaint

DATE	PROCEEDINGS
1988	
May 2	Plaintiffs' Motion to Strike Defendant Pledger's Supplement to Answer Second Amended Complaint, or, Alternatively, to Deny Allegations for Declaratory Judgment
May 4	Motion to Intervene by City of Fayetteville, Arkansas (with proposed Answer attached as Exhibit C)
May 9	Order Allowing Intervention by City of Fayetteville, Arkansas
1989	
	Opinion [by Pulaski County Chancery Court]
Mar. 13	Order and Judgment [releasing amount in escrow account]
Mar. 21	Order Denying Motion for Stay of Order Rescinding Preliminary Injunction [Escrow Account]
Mar. 23	Supplemental Notice of Appeal [Arkansas Supreme Court]
1990	
Feb. 28	Opinion by Arkansas Supreme Court
Mar. 16	Commissioner of Revenues' Petition for Rehearing
Mar. 20	ACTA and Taxpayers' Petition for Rehearing
Mar. 26	ACTA and Taxpayers' Response to Appellees' Petition for Rehearing

DATE	PROCEEDINGS
Mar. 28	Appellees' Response to Appellant's Petition for Rehearing
Apr. 2	Order of Arkansas Supreme Court denying Petitions for Rehearing
July 2	Petition for Certiorari filed in Docket No. 90-29
July 2	Petition for Certiorari filed in Docket No. 90-38
Oct. 1	Order Granting Petitions for Certiorari in Docket Nos. 90-29 and 90-38 and Consolidating Cases

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers — PLAINTIFFS

vs. — No. 87-2401

CHARLES D. RAGLAND, Commissioner of Revenues; JIMMIE LOU FISHER, Treasurer of the State of Arkansas; DONALD VENHAUS, County Judge, Pulaski County, Arkansas; PATRICIA TEDFORD, Treasurer, Pulaski County, Arkansas; PULASKI COUNTY, ARKANSAS; THE ARKANSAS ASSOCIATION OF COUNTIES; JOANN BOONE, Treasurer, City of Benton, Arkansas; THE CITY OF BENTON, ARKANSAS; THE ARKANSAS MUNICIPAL LEAGUE, and all other similarly situated counties and cities — DEFENDANTS

SECOND AMENDED COMPLAINT
(Filed July 16, 1987)

Come now the Plaintiffs, individually and as representatives of the class of similarly situated taxpayers, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure, and for their cause of action against Charles D. Ragland, Commissioner of Revenues; Jimmie Lou Fisher, Treasurer of the State of Arkansas; Donald Venhaus, County Judge, Pulaski County, Arkansas; Patricia Tedford, Treasurer, Pulaski County, Arkansas; The Arkansas

Association of Counties; Joann Boone, Treasurer, City of Benton, Arkansas; The City of Benton, Arkansas; The Arkansas Municipal League, individually and as representative of a class of similarly situated counties and cities, as Defendants, do hereby allege and state as follows:

PLAINTIFFS

1. Plaintiff, Daniel L. Medlock, is an individual, a taxpayer, a subscriber to cable television services, and a citizen of the City of Little Rock, Pulaski County, Arkansas.

2. Plaintiff, Community Communications Company, is a corporation organized and existing under the laws of the State of Arkansas, with its principal office located in Drew County, Arkanas. Community Communications Company owns and operates a cable television system in the State of Arkansas which provides cable television services that will be illegally subjected to the Arkansas Gross Receipts Tax and various local Gross Receipts Taxes.

3. Plaintiff, Arkansas Cable Television Association, Inc., is a not-for-profit corporation that is a trade organization representing over 100 providers of cable television service within the State of Arkansas, with its principal office located in the City of Little Rock, Pulaski County, Arkansas.

DEFENDANTS

4. Defendant, Charles D. Ragland, is the duly appointed and acting Commissioner of Revenues for the State of Arkansas, and the individual charged with collecting and enforcing both the state and local Gross Receipts Taxes imposed under the laws of the State of Arkansas.

5. Defendant, Jimmie Lou Fisher, is the duly elected and acting Treasurer of the State of Arkansas, and is the official charged with accounting for and distributing both the

state and local Gross Receipts Taxes to the General Treasury of the State of Arkansas and to the respective county and municipal governmental entities throughout the State of Arkansas, where a local Gross Receipts Tax will be imposed upon cable television services because of the provisions of Act 188 of 1987.

6. Defendant, Donald Venhaus, is the duly elected and acting County Judge for Pulaski County, Arkansas. Defendant, Patricia Tedford, is the duly elected and acting Treasurer of Pulaski County, Arkansas. Defendant, Pulaski County, Arkansas, is a political subdivision of the State of Arkansas that has been validly created pursuant to law.

7. Defendant, Arkansas Association of Counties is a not-for-profit organization created under the laws of the State of Arkansas for the purpose of representing the interests of all of the respective county governments in the State of Arkansas, all of which counties are members of this Association. The principal office and place of business of this Association is located in the City of Little Rock, Pulaski County, Arkansas.

8. Defendant, Joann Boone, is the Treasurer, chief fiscal officer and disbursing agent for the City of Benton, Arkansas. Defendant the City of Benton, Arkansas, is an existing municipal corporation that has been validly created pursuant to law.

9. The Arkansas Municipal League is a not-for-profit organization created under the laws of the State of Arkansas of which the majority of the municipal corporations organized in the State of Arkansas are active dues paying members. The principal office and place of business of the Arkansas Municipal League is located in the City of Little Rock, Pulaski County, Arkansas.

GENERAL CAUSE OF ACTION

10. This is an action to enjoin, as an illegal exaction, the collection, from the Plaintiffs and all other similarly situated taxpayers, of the 4% Gross Receipts Tax imposed by the State of Arkansas and the 1% local Gross Receipts Taxes imposed by Pulaski County, Arkansas, the Cityof Benton, Arkansas, and all other similarly situated counties and municipal corporations in the State of Arkansas that impose a 1% local Gross Receipts Tax upon cable television services in violation of the Plaintiffs' constitutional right to free speech: to enjoin the appropriation and expenditure of the funds generated by these illegal levies; to order an escrowing of the tax monies collected during the pendency of this action; and to order an accounting and refund to the Plaintiffs and all similarly situated taxpayers of the amounts of the illegally exacted state and local Gross Receipts Taxes that may be collected by Defendant Ragland on or after July 1, 1987, pursuant to the provisions of Act 188 of 1987, plus interest as provided by law, less the cost of administration and the award of an attorney's fee.

JURISDICTION

11. This Court's jurisdiction is founded upon Article 16, § 13, of the Constitution of the State of Arkansas. Alternatively, this Court has jurisdiction of this action under the provisions of 42 U.S.C. § 1983 in that Act 188 of 1987 deprives the Plaintiffs of rights, privileges and immunities and the equal protection of the laws secured by the Constitution and laws of the United States of America and the Constitution of the State of Arkansas. Alternatively, this Court has jurisdiction of this action under the provisions of Ark. Stat. Ann. § 34-2501 and Rule 57 of the Arkansas Rules of Civil Procedure, inasmuch as the implementation of Act 188 of 1987, as currently proposed by the Defendants, will illegally deprive the Plaintiffs and all similarly situated taxpayers of monies which they will not owe to the State of Arkansas and to the respective counties and cities that

impose a 1% local Gross Receipts Tax, and thus, a real case and controversy exists for determination of the parties' rights pursuant to a declaratory judgment.

CLASS ACTION

12. Plaintiffs bring this action on behalf of themselves and, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure, all other cable television service providers and taxpayers who are similarly situated, to test the legality and constitutionality of the provisions of Act 188 of 1987, so as to protect the constitutional rights of all cable television service providers to free speech and to protect the affected class of taxpayers against the enforcement of illegal exactions that will be imposed because of this Act. The affected cable television service providers form a class of more than 100 and the affected taxpayers form a class in excess of 400,000 individual taxpaying subscribers to cable television services in the State of Arkansas that are similarly situated. Such class of Plaintiffs is so large that it is impractical to bring them all before this Court within a reasonable period of time. The certification of this action as a class action will avoid a multiplicity of possibly conflicting adjudications on the same issue. There are questions of law and fact presented herein which are common to the entire class of Plaintiff cable television service providers and taxpayers. The claims of the Plaintiffs herein are typical of the claims of the above-described class. Plaintiffs will fairly and adequately protect the interests of the entire class and prosecute this action for the benefit of all members of that class.

13. Defendants Donald Venhaus, Patricia Tedford, and Pulaski County are representative of a large number of Arkansas counties that have imposed a 1% local Gross Receipts Tax, pursuant to the provisions of either Act 991 of 1981, or Act 26 of 1981, First Extraordinary Session. Defendants, Joann Boone and the City of Benton, Arkansas, are representative of a large number of municipal

corporations in the State of Arkansas that have imposed a 1% local Gross Receipts Tax under the provisions of Act 4 of 1968, Act 990 of 1975, Act 48 of 1977, or Act 25 if 1981, First Extraordinary Session. Defendant, Association of Arkansas Counties is a not-for-profit corporation whose membership is composed of all of the counties in the State of Arkansas, including those counties in which a 1% local Gross Receipts Tax has been adopted. Defendant, Arkansas Municipal League, is a not-for-profit corporation, whose membership is composed of the majority of the municipal corporations in the State of Arkansas, including a number of municipal corporations that have either imposed a 1% or greater local Gross Receipts Tax themselves or are direct beneficiaries of a 1% local Gross Receipts Tax imposed by the county in which such municipal corporations exist. Plaintiffs bring this action against these named Defendants, individually and as representatives of all other counties and municipal corporations in the State of Arkansas that are similarly situated because such governmental entities will impose a 1% local Gross Receipts Tax upon cable television services. All of the counties and municipal corporations that impose a local Gross Receipts Tax form a class of Defendants in excess of 250 governmental entities that are similarly situated. Such class of Defendants is so large that it is impractical to bring them all before this Court within a reasonable period of time. The certification of this action as a class action will avoid a multiplicity of possibly conflicting adjudications on the same issue. There are questions of law and facts presented herein that are common to the entire class of Defendant governmental entities. The claims of the named Defendants herein are typical of the claims of all similarly situated counties or municipal corporations comprising the above-described class. The named county and municipal defendants, the representative organizations of such cities and counties, and the named State officials will fairly and adequately protect the interests of the entire class of county and municipal government defendants and will be able to defend against the prosecution of this action for the benefit of all members of the above-described class of defendants.

SPECIFIC CAUSES OF ACTION

14. This is an action (1) to have declared as an illegal exaction, under Article 16, § 13 of the Constitution of the State of Arkansas, the imposition and collection of both the Gross Receipts Tax imposed by (a) the State of Arkansas and (b) by various counties and municipal corporations existing within the State of Arkansas, pursuant to the provisions of Act 188 of 1987, on and from the Plaintiffs and all other similarly situated cable television service providers and taxpayers; (2) to place all Gross Receipts Tax monies subsequently collected by Defendant Charles D. Ragland under the provisions of Act 188 of 1987 in a special interest bearing account outside of the General Fund or designated Special Revenue Funds of the State of Arkansas, pending the outcome of this proceeding; (3) to order an accounting to the Plaintiffs and all other similarly situated taxpayers of the amounts of the illegally exacted Gross Receipts Taxes that will be collected pursuant to the provisions of Act 188 of 1987; and (4) to order a refund of such taxes, plus interest from the date of payment to the date of refund (less the costs of administration and the award of an attorney's fee), to each taxpayer-member of the Plaintiff-class. Plaintiffs also seek to have declared unconstitutional under both the United States Constitution and the Constitution of the State of Arkansas, the provisions of Act 188 of 1987 for the reasons set forth below.

15. On March 12, 1987, the Honorable Bill Clinton, Governor of the State of Arkansas, approved House Bill 1784 as passed by the 76th General Assembly of the State of Arkansas, said Bill then becoming Act 188 of 1987, the provisions of which are to become effective on and after July 1, 1987. A copy of Act 188 of 1987 is attached hereto as Exhibit A.

16. The Plaintiffs, on behalf of themselves and all other similarly situated cable television service providers and taxpayers, contend, and in this action seek to prove, that Act 188 of 1987 does both facially and actually:

(a) Single out cable television services upon which to impose Gross Receipts Taxes, which imposition of these taxes abridges the freedom of speech guaranteed the members of the Plaintiff-class by the provisions of the First and Fourteenth Amendment of the United States Constitution, because such Gross Receipts Taxes are not imposed upon other similarly situated instrumentalities of public communication, of either an electronic or print media, in the State of Arkansas;

(b) Selectively imposes upon the providers of cable television service a tax burden not shared by the providers of other forms or instrumentalities of public communication, either of an electronic or print media, in violation of the privileges and immunities clause of the United States Constitution, Article 4, § 2 and the privileges and immunities clause of Constitution of the State of Arkansas, Article 2, § 18.

(c) Deprives the providers of cable television services in the State of Arkansas the benefit of the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the United States Constitution and Article 2, § 3 of the Constitution of the State of Arkansas, since the state laws that impose both the state and local Gross Receipts Taxes in question discriminate in favor of other forms or instrumentalities of public communication, either of electronic or print media, by either specifically exempting or excluding such forms or instrumentalities of public communication from the state and local Gross Receipts Taxes imposed within the State of Arkansas, while illegally singling out cable television services upon which to impose such Gross Receipts Taxes.

(d) Causes Act 188 of 1987 to be incompatible and contrary to the Federal law on a subject matter in which the federal law standards preempt and preclude inconsistent state treatment and discriminatorily taxes cable television services in

violation of the supremacy clause of the United States Constitution, Article 6, § 2 and the provisions of § 542 of the Cable Communications Policy Act of 1984 (42 U.S.C. § 542).

17. The business of providing cable television services in the State of Arkansas, like that of newspapers and magazines, is to provide cable television service subscribers with a mixure of news, information and entertainment. As do newspapers and magazines, Community Communications Company and all other cable television service providers in the State of Arkansas use a portion of their available space to reprint (or re-transmit) the communications of others, while at the same time providing some original content and programming.

18. Community Communications Company and the other cable television service providers in the State of Arkansas exercise editorial discretion over which stations or programs to include in its programming repertoire. Community Communications Company and all other cable television service providers in the State of Arkansas seek to communicate messages on a wide variety of topics and a wide variety of formats, including public access channels and public announcements or electronic bulletin boards.

19. Like the activities of wireless television and radio broadcasters, satellite television broadcast companies, newspapers, magazines, book publishers, public speakers and pamphleteers, Community Communications Company and all other cable television service providers in the State of Arkansas are engaged in communication of ideas, expressions, philosophies, and news that are protected by the right of free speech guaranteed by the First Amendment to the United States Constitution.

ESCROWING OF MONIES

20. While this action is pending, Plaintiffs further state that Defendant Ragland will collect and continue to

collect both the state and local Gross Receipts Tax monies representing the Gross Receipts Taxes imposed because of the provisions of Act 188 of 1987. Until a judgment becomes final in this proceeding, Plaintiffs contend that the Defendants should be preliminarily and permanently enjoined, pursuant to the provisions of Rule 65 of the Arkansas Rules of Civil Procedure, from actually depositing any of these monies into the State Treasury or distributing any of the 1% local Gross Recepits Taxes generated because of Act 188 of 1987 to any of the counties or municipal corporations in which jurisdictions such local taxes are imposed. Further, Plaintiffs state that the Defendants should be preliminarily and permanently enjoined from expending any of the state or local Gross Receipts Tax moneys illegally exacted from them because of the provisions of Act 188 of 1987. All monies collected by Defendant Ragland because of the provisions of Act 188 of 1987 (pending the outcome of this proceeding) should be held by Defendant Ragland or Defendant Fisher (or by a third party so designated by this Court) in a special interest bearing account or accounts designated as the Cable Television Service Tax Collections Fund.

ATTORNEY'S FEE

21. Plaintiffs' solicitor should be apportioned and awarded a reasonable part of the total fund created by this action, (which fund will be comprised of both the state and local Gross Receipts Tax held to be illegally exacted from the members of the Plaintiff-class, plus interest as provided by Ark. Stat. Ann. § 84-4708) for professional services rendered to the named Plaintiffs and to the other members of the similarly situated class of taxpayers, pursuant to the provisions of Ark. Stat. Ann. § 84-4601, the provisions of 42 U.S.C. § 1988, or the "common fund" theory created by common law, with the balance of such fund being refunded to the individual members of the Plaintiff-class.

WHEREFORE, Plaintiffs pray that this Court will enter Orders and a Judgment finding as follows:

1. That the Defendants should be temporarily restrained from depositing any monies collected, because of the provisions of Act 188 of 1987, into the General Treasury of the State of Arkansas;

2. That the Court should set a hearing as soon as practicable to issue a preliminary injunction to the Defendants, requiring them to deposit the monies collected by them because of the provisions of Act 188 of 1987 into a specially designated interest bearing accouunt, which monies, after the payment of costs and fees, shall be held subject to refund to each member of the class when judgment in this proceeding becomes final;

3. That the Court find that the issues raised by this Complaint are common to all similarly situated taxpayers and governmental entities and that this action should be maintained as a class action on behalf of both the Plaintiffs and the Defendants, as representatives of the groups of taxpayers and governmental entities that they respectively represent;

4. That the Gross Receipts Taxes imposed because of Act 188 of 1987 will be declared unconstitutional and an illegal exaction;

5. That the total amount of illegally exacted Gross Receipts Taxes imposed because of Act 188 of 1987, together with interest as provided by law, will be accounted for and, after the payments of costs and fees, will be ordered refunded to the Plaintiffs and all similarly situated members of the Plaintiff-class;

6. That the Plaintiffs' attorneys be apportioned and awarded a reasonable part of the total fund held subject to refund as compensation for professional services performed and for reimbursement of costs expended, as provided by Ark. Stat. Ann. § 84-4601, by 42 U.S.C. § 1988, or under the "common fund" theory established at common law.

7. That the Court will grant such other and further relief as it deems just and equitable.

/s/ Eugene G. Sayre

Eugene G. Sayre
3400 Capitol Tower
Little Rock, Arkansas 72201
(501) 375-1122

Solicitor for Plaintiffs and
All Other Members of the
Plaintiff-class

(CERTIFICATE OF SERVICE omitted in printing)

EXHIBIT A

ACT 188 1987
A BILL

State of Arkansas
76th General Assembly
Regular Session, 1987
By: Representative Lipton

HOUSE BILL
784

For An Act To Be Entitled

"AN ACT TO AMEND SUBSECTION (c) OF SECTION 3 OF ACT 386 OF 1941, AS AMENDED, [ARK. STATS. ANN. §84-1903(c)] TO IMPOSE THE ARKANSAS GROSS RECEIPTS TAX UPON CABLE TELEVISION SERVICES; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Subsection (c) of Section 3 of Act 386 of 1941, as amended, the same being Arkansas Statutes Ann. §84-1903(c) is hereby amended by adding the following paragraph (4) at the end thereof:

"(4) Cable television services provided to subscribers or users. This shall include all service charges and rental charges whether for basic service or premium channels or other special service, and shall include installation and repair service charges and any other charges having any connection with the providing of cable television services."

SECTION 2. All laws or parts of laws in conflict with this Act are hereby repealed.

SECTION 3. It is hereby found and determined by the General Assembly that the State of Arkansas is in serious danger of losing revenues which are necessary to provide adequate funding for schools and other essential services required by the citizens of this State and the provisions of this Act are necessary to avoid a substantial reduction in State revenues. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect on and after July 1, 1987.

3/12/87
APPROVED BY /s/ Bill Clinton

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION
(caption omitted in printing)

ANSWER TO SECOND AMENDED COMPLAINT
(Filed July 28, 1987)

Comes Charles D. Ragland, Commissioner of Revenues, and for his Answer to Second Amended Complaint, states:

(1) He admits the allegations in paragraphs 4, 5, 6, 8 and 15 of the Complaint.

(2) He admits the allegations in paragraph 2 except he denies the taxes to which cable television services will be subjected are illegal.

(3) He admits the allegations in paragraph 3 that Arkansas Cable Television Association is a not-for-profit trade organization with its principal office located in Pulaski County, Arkansas but is without knowledge of and denies the other allegations in this paragraph.

(4) He admits the allegations in paragraph 7 that Arkansas Association of Counties is a not-for-profit organization created under the laws of the State of Arkansas with its principal office and place of business in Little Rock, Pulaski County, Arkansas but is without knowledge of and therefore denies the other allegations in paragraph 7.

(5) He admits the allegation in paragraph 9 that the Arkansas Municipal League is a not-for-profit corporation created under the laws of the State of Arkansas, having its principal office and place of business in Pulaski County, Arkansas, but it is without knowledge of and therefore denies the other allegations in paragraph 9.

(6) He admits that the Complaint in this cause of action attempts to accomplish those things set out in paragraphs 10 and 14 of the Complaint but denies that any relief should be granted.

(7) He admits the allegations in paragraph 11 that this Court has jurisdiction to enjoin an illegal exaction under Article 16, Section 13, of the Arkansas Constitution and that the Court has jurisdiction to issue declaratory judgments under Ark. Stat. Ann. §34-2501 and Rule 57 of the Arkansas Rules of Civil Procedure, but denies the Court should take jurisdiction under 42 U.S.C., Section 1983, in that no plaintiff in this cause of action has alleged any fact showing he is engaged in any activities involving free speech or free press.

(8) He admits the allegation in paragraph 20 that he will collect State and Local Gross Receipts Tax levied under Act 188 of 1987 but denies the tax is illegal and that any injunction should be issued or money put in any separate account.

(9) He is without knowledge of and therefore denies the allegations in paragraph 1, 12 and 13 of the Complaint.

(10) He denies the allegations in paragraph 16.

(11) He denies the allegations in paragraph 21.

(12) He is without knowledge of and therefore denies the general allegations in paragraphs 17, 18 and 19 of the Second Amended Complaint. Further the allegations in these paragraphs are general statements concerning the general practice and activities of cable television companies and other members of the media. There is no specific allegation of fact which would show that any particuular member of this class is engaged in free speech activities.

(13) The Complaint fails to state facts which show that:

(a) That the providing of cable television service is a constitutionally protected speech of press activity.

(b) How any speech or press activity which might be engaged in is discriminated against by Act 188 of 1987.

WHEREFORE, the Commissioner of Revenues prays the prayer in his original Answer be granted, his costs and all other proper relief.

CHARLES D. RAGLAND
COMMISSIONER OF REVENUES

BY: /s/ Wayne Zakrzewski

Wayne Zakrzewski, Attorney
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, AR 72203
(501) 371-2451

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION
(caption omitted in printing)

COUNTERCLAIM
(Filed August 4, 1987)

Comes Charles D. Ragland, Commissioner of Revenues for the State of Arkansas, and for his Counterclaim against Plaintiff, Community Communities Company, and all similarly situated cable television service providers, states:

(1) The members of the above stated Plaintiff class will collect the sales tax from their customers at the rate of four percent (4%) plus any local tax due of the total gross receipts.

(2) If these Plaintiffs remit this tax to the Commissioner of Revenues on or before the 20th day of the month following the month in which it is collected they are allowed to remit only 98 percent of the tax due and keep two percent (2%).

(3) If Plaintiffs are successful in this cause of action the members of the class comprised of Daniel L. Medlock and other similarly situated taxpayers have requested and would be entitled to a refund of 100 percent of the amount which they paid and a refund may be ordered and adjudged against Defendants.

(4) The Commissioner of Revenues and therefore the State's and cities and counties which are members of the Defendant class would never have received those amounts kept by the members of the Plaintiff class who remit the tax as a discount.

WHEREFORE, Defendant prays that if a judgment is rendered whereby money collected under Act 188 of 1987 must be refunded that members of the Plaintiff class who collect the tax and receive a discount for their collection be required to contribute any money which they received as a discount in satisfaction of the judgment and that Defendant have judgment against them for such amounts and for all proper relief.

CHARLES D. RAGLAND
COMMISSIONER OF REVENUES

BY: /s/ Wayne Zakrzewski

Wayne Zakrzewski, Attorney
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, AR 72203
(501) 371-2451

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
(caption omitted in printing)

ANSWER TO SECOND AMENDED COMPLAINT
(Filed August 4, 1987)

Comes now separate defendant, Jimmie Lou Fisher, Treasurer of the State of Arkansas, by and through her counsel, and for her Answer states:

1. The first unnumbered paragraph of plaintiffs' Second Amended Complaint is information in nature and as such requires no response. But insofar as it is plaintiffs' attempt to allege sufficiency of class representation under the provisions of Rule 22 of the Arkansas Rules of Civil Procedure, the allegation is denied.

2. Separate defendant Fisher admits upon information and belief allegations contained in paragraphs 1, 4, 5, 6, 8 and 15 of the Second Amended Complaint.

3. Separate defendant Fisher admits in part and denies in part allegations contained in paragraph 2 of the Second Amended Complaint in that she denies that the taxes to which cable television services will be subjected are illegal, admitting upon belief the remaining allegations in that paragraph.

4. Separate defendant Fisher admits in part and denies in part allegations contained in paragraph 3 of the Second Amended Complaint in that she admits upon belief that the Arkansas Cable Television Association is a not for profit trade organization with its principle office located in Pulaski County, Arkansas. Pleading further, she states that she is without sufficient knowledge or belief of and therefore denies the remaining allegations in that paragraph.

5. Separate defendant Fisher admits in part and denies in part the allegations contained in paragraph 7 of the Second Amended Complaint in that she admits upon belief that the Arkansas Association of Counties is a not for profit orrganization created under the laws of the State of Arkansas with its principle office and place of business in Little Rock, Pulaski County, Arkansas. Pleading further she states that she is without sufficient information or knowledge of and therefore denies the remaining allegations in that paragraph.

6. Separate defendant Fisher admits in part and denies in part the allegations contained in paragraph 9 of the

Second Amended Complaint in that she admits upon belief that the Arkansas Municipal League is a not for profit corporation created under the laws of the State of Arkansas, having its principle office and place of business in Pulaski County, Arkansas. Pleading further, she states that she is without sufficient knowledge or belief and therefore denies the remaining allegations in that paragraph.

7. Separate defendant Fisher admits that the Second Amended Complaint attempts to enunciate a general cause of action in paragraph 10 of the Second Amended Complaint. Pleading further, separate defendant Fisher denies a valid cause of action is stated in paragraph 10 of the Second Amended Complaint, that the plaintiffs' constitutionnal rights were violated, or that any relief as requested in that paragraph should be granted.

8. Paragraph 11 of the Second Amended Complaint is a jurisdictional statement, and as such requires no response but insofar as plaintiffs attempt to state a cause of action or otherwise imply that a valid cause of action exists, it is denied.

9. Separate defendant Fisher admits that in paragraph 12 of the Second Amended Complaint that plaintiffs attempt to characterize this action as a class action and to otherwise allege that the requirements for the maintenance of a class action suit under Rule 23 of the Arkansas Rules of Civil Procedure have been met. The validity of this characterization is denied.

10. Separate defendant Fisher is without sufficient information or knowledge to form a belief as to the truthfulness or accuracy of allegations contained in paragraph 18 of the Second Amended Complaint and therefore denies those allegations.

11. Separate defendant Fisher admits that plaintiffs attempt to state a specific cause of action for an illegal

exaction in paragraph 14 of the Second Amended Complaint. Pleading further separate defendant Fisher denies that a valid cause of action, as articulated in this paragraph, exists.

12. Separate defendant Fisher denies the existance or validity of all material allegations contained in Paragraph 16(a) through (d) of the Second Amended Complaint.

13. Separate defendant Fisher is without sufficient information or knowledge to form a belief as to the truthfulness or accuracy of allegations contained in paragraphs 17 - 19 of the Second Second Amended Complaint and therefore denies those allegations.

14. Separate defendant Fisher denies that plaintiffs are, or should be, entitled to any relief sought in paragraph 20, 21 of the Second Amended Complaint.

15. Separate defendant Fisher denies that plaintiffs are entitled to any relief sought in their prayer for relief (paragraphs 1 through 7) of their Second Amended Complaint.

AFFIRMATIVE DEFENSES

16. Separate defendant Fisher affirmatively states that plaintiffs fail to state a cause of action in that they fail to state facts which would show that:

(a) The provision of cable television services is a constitutional protected speech or press activity;

(b) That any First Amendment, speech or press activity, if engaged in by plaintiffs, is discriminated against by Act 188 of 1987 Acts of Arkansas;

(c) That any First Amendment, speech or press activity, if it is engaged in, is or will be subject to a deprivation of United States Constitutional Fourteenth Amendment Rights.

17. Affirmatively pleading, separate defendant Fisher states that Act 188 of 1987, Acts of Arkansas is constitutional as enacted.

18. Affirmatively pleading, separate defendant Fisher states that plaintiffs lack standing on all issues.

19. Affirmatively pleading, separate defendant Fisher states that plaintifffs have failed to meet the standards required for injunctive relief

20. Affirmatively pleading, separate defendant Fisher specifically reserves the right to amend her response and plead further.

WHEREFORE, separate defendant Jimmie Lou Fisher, Treasurer of the State of Arkansas prays that this Court dismiss this cause of action, for her costs, and for all other proper relief.

Respectfully submitted,

STEVE CLARK
Attorney General

BY: /s/ Kay J. Jackson Demailly

KAY J. JACKSON DEMAILLY
Assistant Attorney General
201 E. Markham
Heritage West Bldg.
Little Rock, AR 72201
(501) 371-2007

Attorneys for Separate
Defendant Jimmie Lou Fisher

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION
(caption omitted in printing)

SEPARATE DEFENDANTS' ANSWER TO
PLAINTIFFS' SECOND AMENDED COMPLAINT
(Filed August 5, 1987)

Come now Separate Defendants, Don Venhaus, Pulaski County Judge, Patricia Tedford, Pulaski County Treasurer and Pulaski County, Arkansas, by and through their solicitors, Ivester, Henry, Skinner & Camp, and for their Answer, state:

1. Judge Venhaus, Treasurer Tedford and Pulaski County deny each and every material allegation contained in the Complaint unless specifically admitted herein.

2. Judge Venhaus, Treasurer Tedford and Pulaski County admit the allegations contained in Paragraphs 4, 5, 6 and 15 of the Complaint.

3. Judge Venhaus, Treasurer Tedford and Pulaski County are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs 1, 2, 3, 8, 9, 12, 16, 20 and 21 of the Complaint and, therefore, deny same.

4. Judge Venhaus, Treasurer Tedford and Pulaski County admit that this cause of action attempts to accomplish those things described in Paragraphs 10 and 14 of the Complaint but specifically deny that any relief should be granted.

5. Judge Venhaus, Treasurer Tedford and Pulaski County admit the allegations contained in Paragraph 7 of the Complaint to the extent that the Arkansas Association of Counties is a not-for-profit corganization created under the

laws of the State of Arkansas, but specifically deny that the purpose of the organization is to represent the legal interests of the respective county governments in the State of Arkansas.

6. Judge Venhaus, Treasurer Tedford and Pulaski County admit the allegations contained in Paragraph 11 of the Complaint to the extent that this Court has jurisdiction to enjoin an illegal exaction under Article 16, §13, of the Constitution of the State of Arkansas, and that this Court has jurisdiction to issue declaratory judgments under Ark. Stat. Ann. §34-2501 and Rule 57 of the Arkansas Rules of Civil Procedure. Judge Venhaus, Treasurer Tedford and Pulaski County specifically deny that Plaintiffs have alleged any facts which will allow this Court to impose such remedies. Further, Judge Venhaus, Treasurer Tedford and Pulaski County specifically deny that Plaintiffs have alleged any facts which will allow this Court to retain jurisdiction pursuant to 42 U.S.C. §1988.

7. Judge Venhaus, Treasurer Tedford and Pulaski County admit the allegations contained in Paragraph 13 of the Complaint to the extent that Pulaski County has imposed a 1% local Gross Receipts Tax, but specifically deny they are representative of a large number of Arkansas counties that have imposed the same. Judge Venhaus, Treasurer Tedford and Pulaski County are without knowledge or information as to the truth of the remaining averments in Paragraph 13 of the Complaint and, therefore, deny same.

8. Judge Venhaus, Treasurer Tedford and Pulaski County specifically deny the allegations contained in Paragraphs 17, 18 and 19 of the Complaint.

9. Plaintiffs' Complaint fails to state sufficient facts which might entitle Plaintiff to the relief requested.

10. Judge Venhaus, Treasurer Tedford and Pulaski County reserve the right to plead further.

WHEREFORE, having answered, Separate Defendants pray this Court enter an Order dismissing the Second Amended Complaint of Plaintiffs, allowing Plaintiffs to take nothing, and further, awarding Separate Defendants their costs, a reasonnable solicitor's fee and all other just and equitable relief to which they may be entitled.

Respectfully submitted,

IVESTER, HENRY, SKINNER & CAMP
221 West 2nd, Suite 411
Little Rock, Arkansas 72201

BY: /s/ Robert Keller Jackson
ROBERT KELLER JACKSON

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT
OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

PLAINTIFFS' ANSWER TO DEFENDANT RAGLAND'S COUNTERCLAIM

(Filed August 14, 1987)

Come now the representative members of the Plaintiff-class, and for their Answer to the Counterclaim filed herein by Defendant Ragland, regarding the 2% discount amount of the disputed state and local Sales Taxes imposed upon cable television services by the provisions of Act 188 of 1987, which 2% amount the individual cable television system operator-members of the Plaintiff-class are entitled to retain, under the provisions of Ark. Stat. Ann. § 84-1915, if such amounts are remitted to Defendant Ragland prior to the 20th day of the month following the month in which the disputed state

and local Sales Taxes are collected, and state and allege as follows:

1. Admits the allegations contained in paragraph (1) of Defendant Ragland's Counterclaim.

2. Admits the allegations contained in paragraph (2) of Defendant Ragland's Counterclaim.

3. Admits the allegations contained in paragraph (3) of Defendant Ragland's Counterclaim.

4. Admits the allegations contained in paragraph (4) of Defendant Ragland's Counterclaim.

Offer of Deposit

5. To avoid any possible or potential conflict between the cable television system operator-members of the Plaintiff-class and the cable television service taxpayer-subscriber members of the Plaintiff-class, over the 2% discount amounts collected by the former from the latter, the cable television system operator members of the Plaintiff-class will agree to the entry of an Order by this Court requiring them to pay the 2% discount amounts to Defendant Ragland, conditioned upon such amounts being ordered held in an interest bearing escrow account, outside of the State Treasury, pending a final decision in this case, upon the specific understanding and agreement that such amounts will be refunded, plus interest, to each respective cable television system operator-member of the Plaintiff-class if the Plaintiffs' constitutional contest of the provisions of Act 188 of 1987 is ultimately held to be unsuccessful.

WHEREFORE, the members of the Plaintiff-class pray that the Court will enter an Order requiring them to pay the 2% discount amounts of the disputed state and local Sales Taxes to Defendant Ragland, and that Defendant Ragland be required to hold such amounts in an interest bearing escrow

account outside the State Treasury, pending a final determination in this case.

BY: /s/ Eugene G. Sayre

Eugene G. Sayre
JACK, LYON & JONES, P.A.
3400 Capitol Tower
Little Rock, Arkansas 72201
(501) 375-1122

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT
OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

(Filed August 28, 1987)

ORDER ON PENDING MOTIONS

On July 16, 1987, the Plaintiffs herein filed a Motion requesting the entry of a Preliminary Injunction requiring the Commissioner of Revenues to create an interest bearing escrow account into which all of the disputed state and local Gross Receipts (Sales) Taxes imposed because of the adoption of Act 188 of 1987 would be deposited, until a Judgment becomes final in this action. On that same day, the Plaintiffs filed a Motion to Certify this case as a Class Action, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure, wherein the movants requested the creation of both a Plaintiff-class and a Defendant-class. The various Defendants have responded, and the Commissioner of Revenues has filed a separate Motion for Preliminary Injunction and Counterclaim, requesting that the Court order all cable television system operators in the State of Arkansas to pay over to him the 2% discount amount such cable television system operators might be entitled to retain

if they file their monthly Sales Tax Reports on or before the 20th of the month following the month in which the disputed state and local Gross Receipts (Sales) Taxes in question were collected.

On August 19, 1987, an evidentiary hearing was held before the Court where both oral testimony and documentary evidence were introduced. After considering the matters presented by the pleadings, the motions and responses thereto, the evidence introduced at the August 19, 1987, hearing, and the arguments of all parties involved, the Court makes the following findings of fact and conclusions of law regarding the issues presented by these pending motions.

Findings of Fact

1. In the Second Amended Complaint filed herein on July 16, 1987, the Plaintiffs seek, on behalf of themselves and all similarly situated taxpayers and cable television system operators, to contest the legality and constitutionality of the state and local Gross Receipts (Sales) Taxes imposed by the provisions of Act 188 of 1987 as an "illegal exaction" under the provisions of Article 16, § 13 of the Arkansas State Constitution.

2. The Defendants have generally filed Answers admitting the jurisdiction of the Court and the identity of the parties, but denying that the extension of the state and local Gross Receipts (Sales) Taxes to cable television services by Act 188 of 1987 is an illegal or unconstitutional Act.

3. The questions of fact and law raised by the pleadings herein are questions common to all taxpayers in the Stte of Arkansas who subscribe to cable television services and to all county and city governments that impose a local Gross Receipts (Sales) Tax. These common issues predominate over any questions which may affect any individual taxpayer-subscribers to cable television services or any individual local governmental entity.

4. Certifying the above-styled cause of action as a class action will provide a fair and efficient adjudication of the controversy herein and it will enable the interpretation, validity and enforcement of the provisions of Act 188 of 1987 to be determined in a single forum in which all parties with an interest in the subject matter will have an opportunity to be heard and will spare the Defendants, in their official capacities, from the possibility of having to defend in a multiplicity of lawsuits on the same issue.

5. By granting the Motion for Preliminary Injunction filed by both the Plaintiffs and the Commissioner of Revenues, and by ordering the entire 100% of the disputed state and local Gross Receipts (Sales) Taxes to be held in an interest bearing escrow account outside of the State Treasury until a Judgment in this case becomes final, then the Court will protect the respective interests of all parties at a minimal administrative cost.

6. Testimony was offered at the hearing that there are over 400,000 subscribers to cable television services in the State of Arkansas and that there are over 100 separate cable television systems providing this cable television service.

7. The Court finds from the evidence introduced at the hearing that there is a substantial difference in the operation of the different cable television system operators throughout the State.

8. The allegations contained in the pleadings and the evidence introduced at the hearing on August 19, 1987, have established that there is a question as to the legality and constitutionality of Act 188 of 1987. Because of this fact, the Court has advanced this case on its trial calendar to decide and dispose of the issues involved herein as quickly as possible, so as not to needlessly disrupt the normal operations of government or to impose taxes which may be deemed "illegal exactions."

Conclusions of Law

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. Since an "illegal exaction" suit, brought pursuant to the provisions of Article 16, § 13 of the Arkansas State Constitution is by its very nature a "class action," the Court feels compelled to certify this action as a class action, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure, only because the Supreme Court of Arkansas has previously held in its decision in the case of *City of Little Rock v. Cash*, 277 Ark. 494, 510-511 (1982) that it is in error for a trial court, under such circumstances, not to require the Plaintiffs to comply with the provisions of Rule 23.

3. The taxpayers, whose payments to their respective cable television system operators for cable television service are subject to the state and local Gross Receipts (Sales) Taxes because of the provisions of Act 188 of 1987, form a class of over 400,000 Plaintiffs, which class is so large that it is impractical to bring them all before this Court within a reasonable period of time. Therefore, the named Plaintiff-taxpayer herein, Daniel L. Medlock, will be certified as a representative Plaintiff to represent all similarly situated taxpayers in the State of Arkansas who subscribe to cable television service and who pay the disputed state and local Gross Receipts (Sales) Taxes imposed upon the charges for this cable television service, because of the provisions of Act 188 of 1987.

4. The Court finds that the cable television system operators who provide the cable television service in the State of Arkansas, the charges for which are subject to the state and local Gross Receipts (Sales) Taxes imposed by Act 188 of 1987, may have different substantive rights with regard to their allegations of abridgement of their constitutional rights to free speech and free press because of the nature and extent of their operations. Thus, the Court

finds that it would not be proper at this time to certify the substantive claims of this group as a separate class of Plaintiffs. However, solely for the purposes of managing the collection and distribution of the entire amount of the disputed state and local Gross Receipts (Sales) Taxes imposed upon the charges made for cable television service in the State of Arkansas (during the pendency of this suit), the Court does find that the class of entities represented by the Community Communications Company and the Arkansas Cable Television Association, Inc., forms a group of over 100 cable television system operators that is so large that it is impractical to bring them all before the Court within a reasonable period of time. Therefore, for the sole purpose of controlling and managing the collection of the disputed state and local Gross Receipts (Sales) Taxes in issue, the Court will certify Community Communications Company and the Arkansas Cable Television Association, Inc. as representatives of a class of cable television system operators who will be subject to the orders of this Court as a class of collectors of the disputed taxes.

5. The Plaintiffs have established the possibility that each individual taxpayer-subscriber member of the Plaintiff-class may suffer irreparable harm, due to an unnecessary diminishment of the amount that they might ultimately recover if the taxes in question are declared to be "illegal exactions," because of the added administrative costs that would have to be incurred if the Motions for Preliminary Injunction are not granted and an interest bearing escrow account is not created. Also, the Plaintiffs have raised questions as to the validity of the state and local Gross Receipts (Sales) Taxes imposed because of the provisions of Act 188 of 1987. Based upon these findings, and because of the recent Order issued by Associate Justice Harry A. Blackmun of the United States Supreme Court on August 14, 1987, to create an interest bearing escrow account in the case of *ATA, Inc., et al. v. Henry C. Gray, et al.*, another and similar "illegal exaction" case now pending before the Arkansas Supreme Court, this Court concludes that similar

action should be taken in this case to protect the interests of all parties involved.

Entered this 28 day of August, 1987.

/s/ Lee A. Munson

Honorable Lee A. Munson
Chancellor

IN THE CHANCERY COURT
OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

PRELIMINARY INJUNCTION

(Filed August 28, 1987)

The representatives of the Plaintiff-class filed a Motion herein seeking the issuance by this Court of a Preliminary Injunction requiring the Defendant Charles D. Ragland, Commissioner of Revenues, to create an interest bearing escrow account and to deposit therein, instead of depositing with the State Treasurer, all of the disputed state and local Gross Receipts (Sales) Taxes collected by him, pursuant to the provisions of Act 188 of 1987, from the membrs of the Plaintiff-class.

In response, Defendant Ragland filed a Motion also seeking the entry of a Preliminary Injunction requiring the cable television system operators in the State of Arkansas, who actually collect and remit the disputed state and local Gross Receipts (Sales) Taxes imposed by Act 188 of 1987, to also remit to the Commissioner of Revenues the 2% discount amount of the disputed state and local Sales Taxes in question that are available to be retained by the cable television system operators, pursuant to the provisions of Ark. Stat. Ann. § 84-1915, if these state and local Sales Taxes

are remitted on or before the 20th of the month following the collection of such taxes.

The Court held an evidentiary hearing on these Motions on August 19, 1987. Based upon the allegations contained in the pleadings and motions of the parties, the oral testimony and documentary evidence offfered at the hearing, and the arguments of counsel contained in their respective briefs, the Court has made separate findings of fact and conclusions of law on the issues presented that are set forth in a separate Order that is being entered simultaneously with this Preliminary Injunction. Therefore, based upon the Court's findings and conclusions regarding the issues presented by the various Motions pending before this Court, it is hereby,

ORDERED that the Commissioner of Revenues shall immediately create an interest bearing escrow account, outside the State Treasury but subject to all procedures currently in place to collateralize deposits of the State of Arkansas. The Commissioner of Revenues shall deposit into that escrow account each month any and all state and local Gross Receipts (Sales) Taxes that are collected and paid to him because of the adoption of Act 188 of 1987, and he shall not deposit these state and local Gross Receipts (Sales) Taxes into the Treasury of the State of Arkansas. It is further,

ORDERED that any such state and local Gross Receipts (Sales) Taxes that have been so deposited into the State Treasury before the entry of this Preliminary Injunction shall be identified by the Commissioner of Revenues and shall be refunded to the Commissioner by the State Treasurer for deposit into this interest bearing escrow account. The State Treasurer shall not deduct any amount (3%) for collection fees from these funds and she shall not distribute any of these disputed state or local Gross Receipts (Sales) Taxes to other State agency accounts or to any county or municipal government, until a judgment in this suit shall become final. It is further,

ORDERED that the Commissioner of Revenues shall prepare a monthly record of the amount and source of these disputed state and local Gross Receipts (Sales) Taxes collected and deposited into the interest bearing escrow account and shall supply a copy of such record to the Court upon request, which information shall be held as confidential and not subject to disclosure. It is further,

ORDERED that the individual cable television system operator members of the Plaintiff-class shall pay over to Defendant Ragland, each month, the entire amount, including the 2% discount amount provided by Ark. Stat. Ann. § 84-1915, of all of the disputed state and local Gross Receipts (Sales) Taxes imposed upon the cable television services provided by them to the taxpayer-subscribers. It is further,

ORDERED that Defendant Ragland shall hold the 2% discount amounts in the interest bearing escrow account, outside of the Treasury of the State of Arkansas, pending a judgment entered in this case becoming final. It is further,

ORDERED that, if the challenge of the Plaintiff-class to the constitutionality of the provisions of Act 188 of 1987 is ultimately held to be unsuccessful by a Judgment that becomes final in this case, then, upon that Judgment becoming final, the 2% discount amounts held by Defendant Ragland under this Order, plus the proportionate amount of interest earned on account of their deposit in such account by each such amount, shall be refunded to the respective cable television service operator members of the Plaintiff-class who have deposited such 2% discount amounts each month with Defendant Ragland. Otherwise, all such funds shall be subject to the further Orders of this Court.

Entered this 28th day of August, 1987.

/s/ Lee A. Munson
Lee A. Munson
Chancellor

Approved as to Form and Substance:

/s/ Eugene G. Sayre

Eugene G. Sayre
JACK, LYON & JONES, P.A.
3400 Capitol Tower
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(501) 375-1122

SOLICITOR FOR PLAINTIFF-CLASS

/s/ Wayne Zakrzewski

Wayne Zakrzewski
Trial Attorney
Department of Finance and
Administration
P.O. Box 1272-L
Little Rock, Arkansas 72203

SOLICITOR FOR DEFENDANT
CHARLES D. RAGLAND
COMMISSIONER OF REVENUES

/s/ Kay J. Jackson Demailly

Kay J. Jackson Demailly
Assistant Attorney General
Suite 310
201 East Markham
Little Rock, Arkansas 72201

SOLICITOR FOR DEFENDANT
JIMMIE LOU FISHER
STATE TREASURER

IN THE CHANCERY COURT OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

ORDER FOR CERTIFICATION AS CLASS ACTION
(Filed August 28, 1987)

On August 19, 1987, the Court took oral testimony and received documentary evidence and considered the arguments of the solicitors for the parties on the Motion filed herein by the Plaintiffs on July 16, 1987, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure, seeking an Order of this Court certifying the above-styled cause as a class action. The Court has today entered a separate Order containing findings of fact and conclusions of law with regard to the issue raised by the Plaintiffs' Motion for Certification as a Class Action. Accordingly, it is hereby

ORDERED that the Motion of the Plaintiffs requesting certification of this matter as a class action should be, and is accordingly hereby, granted in part and this action is hereby certified as a class action, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure and in conformity with this Order. It is further,

ORDERED that this Court certifies as two separate classes of Plaintiffs. These classes are certified as follows:

Class No. 1. All taxpayers in the State of Arkansas who, as subscribers to cable television services, are required to pay the state and local Sales Taxes imposed because of the provisions of Act 188 of 1987. This class of Plaintiffs shall be represented by Daniel L. Medlock.

Class No. 2. All cable television system operators in the State of Arkansas who are required to collect and remit to Defendant, Charles D. Ragland, Commissioner of Revenues for the State of Arkansas, the

state and local Gross Receipts (Sales) Taxes imposed because of the provisions of Act 188 of 1987. This class of Plaintiffs shall be represented by Community Communications Company and the Arkansas Cable Television Association, Inc., and this class is certified solely for the purpose of managing the collection and distribution of the disputed state and local Gross Receipts Tax moneys. This group of cable television system operators is not certified as a class regarding their substantive claims of alleged violations of their constitutional rights. It is further,

ORDERED that since the Court has ordered the creation of an interest bearing escrow account in which the disputed state and local Gross Receipts (Sales) Taxes imposed because of the provisions of Act 188 of 1987 are to be held until a Judgment becomes final in this case, then the Court defers any decision with regard to the Plaintiffs' request for the certification of a Defendant-class composed of counties and cities in Arkansas where a local Gross Receipts (Sales) Tax is imposed, because none of the disputed taxes would even be available for distribution to such local governmental entities, until after a Judgment in this action becomes final. It is further,

ORDERED that the parties hereto are specifically exempted from any requirement of giving further notice in this matter, since the entry of this Order is deemed sufficient notice to the affected class of taxpayers and cable television system operators.

Entered this 28 day of August, 1987.

/s/ Lee A. Munson
Honorable Lee A. Munson

APPROVED AS TO FORM

/s/ Eugene G. Sayre

Eugene G. Sayre
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3400 Capitol Tower
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SOLICITOR FOR PLAINTIFF-CLASS

/s/ Wayne Zakrzewski

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Trial Attorney
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SOLICITOR FOR DEFENDANT
CHARLES D. RAGLAND
COMMISSIONER OF REVENUES

/s/ Kay J. Jackson Demailly

Kay J. Jackson Demailly
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SOLICITOR FOR DEFENDANT
JIMMIE LOU FISHER
STATE TREASURER

IN THE CHANCERY COURT OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

SUPPLEMENT TO ANSWER TO
SECOND AMENDED COMPLAINT
(Filed November 9, 1987)

Comes Jim C. Pledger, Commissioner of Revenues for the State of Arkansas and in Supplement to his Answer previously filed herein states:

(1) 16(b) of Plaintiff's Second Amended Complaint alleges that Act 188 of 1987 selectively imposes upon the providers of cable television service a tax burden not shared by the providers of other forms or instrumentalities of public communications, either of an electronic or print media in violation of certain constitutional provisions.

(2) Although Plaintiff has never alleged facts stating how this discrimination occurs, it is apparent from hearings held in this Court that Plaintiff contends that Plaintiffs are discriminated against because cable television is required to collect and remit sales tax for its services while newspapers and magazines are exempted from the tax.

(3) Newspapers and magazines are exempted from the tax by the provisions found at Ark. Stat. Ann. §84-1904(f) and §84-1904(j).

(4) The Commissioner of Revenues denies that there is any prohibited discrimination against Plaintiffs under present law. However, if any discrimination exists, the discrimination is caused by the exemptions granted to newspapers and magazines and not by the levy of the tax on the service provided by Plaintiffs.

(5) If the Court finds discrimination exists, the Court should declare the exemptions granted to newspapers and

magazines are unconstitutional rather than declaring Act 188 of 1986 to be unconstitutional.

WHEREFORE, Defendant prays the Complaint and all Amendments thereto be dismissed or, in the alternative, that the Court find Act 188 to be valid but those exemptions which create any discrimination which might be found by the Court to be invalid, that the Commissioner be relieved from depositing the money resulting from Act 188 in escrow, for his costs and all other relief.

JIM C. PLEDGER
COMMISSIONER OF REVENUES

BY: /s/ Wayne Zakrzewski

Wayne Zakrzewski, Attorney
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, Arkansas 72203
(501) 371-2451

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

PLAINTIFFS' MOTION TO STRIKE SUPPLEMENT TO DEFENDANT PLEDGER'S ANSWER OR, ALTERNATIVELY, TO DENY WHAT APPEARS MAY BE ALLEGATIONS IN THE NATURE OF A DECLARATORY JUDGMENT

(Filed May 2, 1988)

Comes now the Plaintiffs, by and through their undersigned solicitor, and do hereby move this Court to strike the Supplement to the Answer to Second Amended Complaint of Defendant Pledger, which is unnumbered, but was filed

herein on October 10, 1987. Alternatively, Plaintiffs move that the request for relief contained in paragraph (5) of the Supplement to Answer to Second Amended Complaint of Defendant Pledger, which appears to be in the nature of a request for declaratory judgment, will be denied. As grounds for this Motion, the Plaintiffs would respectfully show this Court as follows:

1. Defendant Pledger filed a pleading herein on October 10, 1987, entitled Supplement to Answer to Second Amended Complaint.

2. The allegations contained in the five (5) numbered paragraphs of this Supplement to Answer filed by Defendant Pledger on October 10, 1987, do not state a set of facts upon which relief can be granted by this Court.

3. The allegations contained in paragraph (5) of the Supplement to Answer to Second Amended Complaint filed herein by Defendant Pledger apparently request that this Court enter a declaratory judgment, inasmuch they seek to have this Court declare invalid the exemption (from the state and local Gross Receipts (Sales) Taxes provided by Ark. Code Ann. § 26-52-401(5), (14) and (15)) for the sale of newspapers, newspaper advertising space and magazines in the State of Arkansas.

4. The issue raised in paragraph (5) of the Supplement to Answer to Second Amended Complaint filed by Defendant Pledger is not properly before this Court in this action, and does not affect the relief sought by the Plaintiffs regarding the imposition of the state and local Gross Receipts (Sales) Taxes upon the charges made for cable television services. Therefore, these allegations should be stricken, or alternatively, the request for a declaratory judgment filed by Defendant Pledger should be denied.

5. The allegations contained in paragraph (5) of the Supplement to Answer to Second Amended Complaint filed

by Defendant Pledger herein on October 10, 1987, seek to have the provisions of a statute declared illegal. Defendant, Pledger, as the Commissioner of Revenues, whose duty it is to administer and interpret the taxing statutes of this state, does not have standing to challenge the validity of the exemption provisions of Ark. Code Ann. § 401(5), (14) and (15) which affect private interests, as opposed to the public interest.

WHEREFORE, the Plaintiffs pray that their Motion to Strike Supplement to Answer Defendant Pledger will be granted, or, in the alternative, that the relief sought by the allegations contained in the Supplement to the Answer to Second Amended Complaint of Defendant Pledger, which appear to be in the nature of a request for a declaratory judgment, will be denied.

Respectfully submitted,

/s/ Eugene G. Sayre

Eugene G. Sayre
JACK, LYON & JONES, P.A.
3400 Capitol Tower
Little Rock, Arkansas 72201
(501) 375-1122

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
(caption omitted in printing)

MOTION TO INTERVENE
(Filed on May 4, 1988)

Comes applicant City of Fayetteville, Arkansas and for its Motion to Intervene states:

1. Applicant's defense and the main action have common questions of law and fact. Plaintiffs' complaint challenges the validity of Arkansas Acts 1987, No. 188 which extends the state and local sales (gross receipts) taxes to charges for cable television services. The City of Fayetteville, Arkansas has levied a one percent local sales (gross receipts) tax pursuant to Ordinance No. 2933 adopted August 2, 1983, a copy of which is attached hereto marked Exhibit "A" and made a part hereof. Said tax was approved at a special election held September 6, 1983, the results of which were certified by the Washington County Election Commission in the certificate attached hereto marked Exhibit "B" and made a part hereof.

2. The intervention will not unduly delay or prejudice the adjudication or the rights of the original parties because the case can be tried May 9, 1988, as scheduled if intervention is granted.

3. Attached hereto, marked Exhibit "C", and made a part hereof, is Intervenor's Answer setting forth the defense for which intervention is sought.

WHEREFORE, the City of Fayetteville, Arkansas prays that it be permitted to intervene in this action.

CITY OF FAYETTEVILLE,
ARKANSAS
INTERVENOR

BY: /s/ James N. McCord

James N. McCord
CITY ATTORNEY
113 W Mountain
Fayetteville, Arkansas 72701
(501) 575-8313

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
(caption omitted in printing)

ANSWER
(Filed May 4, 1988)

Comes Intervenor City of Fayetteville, Arkansas and for its Answer to Plaintiffs' Complaint, as amended, states:

1. Intervenor admits the factual allegations in Plaintiffs' Complaint, as amended.

2. Intervenor admits that the Court has jurisdiction over the parties and admits that the Court has jurisdiction over the subject matter under Art. 16, §13 of the Constitution of the State of Arkansas.

3. Intervenor denies that Arkansas Acts 1987, No. 188 violates the United States Constitution, the Arkansas Constitution, or the provisions of §542 of the Cable Communications Policy Act of 1984, 42 U.S.C. §542.

4. Intervenor denies all allegations in Plaintiffs' Complaint, as amended, not expressly admitted herein.

5. As an affirmative defense to Plaintiffs' claim for a refund of tax revenues collected before creation of the escrow fund pursuant to the Court's order of August 28, 1987, Intervenor pleads voluntary payment.

WHEREFORE, Intervenor City of Fayetteville, Arkansas prays that Plaintiffs' Complaint be dismissed and for all other relief to which it may prove itself entitled.

CITY OF FAYETTEVILLE,
ARKANSAS
INTERVENOR

BY: /s/ James N. McCord

James N. McCord
CITY ATTORNEY
113 W Mountain
Fayetteville, Arkansas 72701
(501) 575-8313

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT OF PULASKI COUNTY
FIRST DIVISION

DANIEL L. MEDLOCK, et. al. PLAINTIFFS

VS. NO. 87-2401

JAMES C. PLEDGER, C mmissioner of Revenues: et. al. DEFENDANTS

Testimony and other proceedings taken ore tenus at the Bar of this Court on the *19th* day of *August, 1987,* before the HONORABLE LEE A. MUNSON, Chancellor, presiding.

APPEARANCES

FOR THE PLAINTIFFS,
Honorable Eugene Sayre

FOR THE DEFENDANTS,
Honorable Wayne Zakrzewski
Honorable Winston Bryant
Honorable Barry Copin
Honorable Robert Jackson
Honorable Kaye J. DeMalley
Honorable James Parker

PROCEEDINGS OF WEDNESDAY, AUGUST 19, 1987:

* * *

[665] *BOB BLOUNT*, a witness called in behalf of the Plaintiffs, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Would you state your name and address for the record, sir?

A. My name is Bob Blount. I live at 2609 Shenandoah Valley Drive in Little Rock.

* * *

[666] Q. What is your profession or employment please, sir?

A. I operate Association Services, which is a trade association management company.

Q. Is the Arkansas Cable Television Association one of the trade groups that you represent?

A. Yes, it is. Arkansas Cable Television Association is one of my clients, and I serve as the Executive Director—Executive Secretary of that association.

A. And, how long have you so held that position?

A. Since—I've held that position since March of 1984.

* * *

Q. Would you describe for the Court the entities that compose the Arkansas Cable Television Association?

A. The Arkansas Cable Television Association is the trade association which represents all of the cable television

operators in the State of Arkansas. We have approximately a hundred—somewhere between a hundred and a hundred and ten cable systems within Arkansas, eighty of which are dues-paying members of the state association.

Q. This is throughout the State of Arkansas?

A. Yes, it is.

* * *

[667] Q. Are there entities that are cable system operators in the State of Arkansas that are not members of the association?

[668] A. Yes, there are. My estimate is that there is approximately twenty perhaps cable systems which are not members of the association.

Q. Can you tell us if they are large or small systems?

A. For the most part, they're very small systems. My guess is that they constitute fewer than five thousand subscribers.

Q. In your position as Executive Director of the association, have you had cause to study or make statistical findings of the number of cable television subscribers in the State of Arkansas?

A. Yes, I've done this from two standpoints. Yes, I have.

* * *

Q. And, from those two sources, have you determined the approximate number of cable television subscribers in the State of Arkansas?

A. Yes, it's somewhere close to four hundred thousand.

[669] Q. That would be four hundred thousand separate subscribers.

A. Yes.

Q. Have you had cause to determine what the average billing per subscriber would be to the State?

A. I've tried to determine this exactly. My best guess would be—

* * *

A. I couldn't tell precisely based upon the responses that we received, because some of the members did not desire to share that information with us. Our guess is that it's somewhere between Thirteen and Fifteen Dollars a month is the average basic—the average bill.

[670] Q. The average bill?

A. Yeah.

Q. And, to that, the sales tax in question would be applied as those are the gross proceeds per subscriber.

A. No, it would be—the sales tax would apply to more than that. The sales tax would also apply to installation charges, any equipment rentals in addition to this basic monthly bill.

Q. Approximately of these hundred systems, how many communities are served in the State of Arkansas?

A. Somewhere close to three hundred communities, and the reason for me hedging on that response is that it's kind of hard to define "what is a community?". Is it incorporated or what? Named-areas? About three hundred.

Q. All right. Am I correct, Mr. Blount, that these cable system are operated on franchises granted by some local governmental authority?

A. Yes.

Q. Using Pulaski County as an example, because that's where the Court is, coiuld you explain how many separate franchises or systems there are here in the county?

A. I think there are about six or seven franchises—

* * *

Q. And, does one cable operator have more than one cable franchise in a county?

A. Yes, sir.

[671] Q. And, are those called MSOs or Multiple System Operators?

A. Yes, sir.

* * *

Q. When did cable begin in Arkansas approximately?

A. Approximately 1954. About 1954.

Q. Where?

A. In Batesville, Arkansas.

Q. Is there any significance about it being first?

A. It was probably one of the first two or three cable television systems in the United States. Jim Wyatt Davidson operated a television/radio repair shop in Batesville, and in

order to pick up the Memphis television station, he ran a line off of his antenna to his neighbor next door and charged him a dollar a month for it.

Q. Would you describe—are you familiar with the basic types of cable services that are provided in the State of Arkansas?

A. Generally speaking.

Q. What are the sizes of the systems—the various systems? By that I [672] mean, how many subscribers will a system have? How do they rate from small to large?

A. The average system—do you have a copy of my directory? Right in the front of that directory I think I have that data, if I'm not mistaken. The average system in Arkansas has four thousand, three hundred subscribers. That runs from the largest of something like sixty-eight thousand subscribers down to the smallest, which is about a hundred and twenty-something subscribers. The mean number of subscribers is right at two thousand. That's midway between the largest and the smallest.

Q. What type of services do these cable systems provide to their subscribers?

A. Well, they provide—first of all, they provide a basic cable service, which is the basic rate. The programming which comprises the basic rate. This would normally be constituted of your broadcast network affiliates and many of your—most of your ad-supported satellite delivered services, and some super stations such as WTBS, WOR out from New York, and WGN from Chicago. That would be your basic, and then in addition to that, there is a premium service such as your movie channels, your Home Box Office, Showtime, and then there are—yeah, that pretty much describes it.

Q. And, these are run by a cable from the receiving station to each individual home or business?

A. Yes.

Q. And, in 1984, the National Cable Policy Act was passed. Does it provide definitions and standards for the cable industry?

[673] A. Yes, sir.

Q. Mr. Blount, I hand you what's been marked as Defendant's—excuse me—Plaintiff's Exhibit Number Two, and ask if you can identify that please, sir.

A. This is a copy of a communication we received from a National Cable Television Association in Washington, D.C., which lists a number of scrambled programming services for which individuals with their own earth receiving stations might—to which they might subscribe.

Q. These—Listed on Plaintiff's Exhibit Number Two are simply the scrambled services that are available?

A. Yes, sir. At the present time, I think there are a total of seven.

Q. These are services that are provided for a fee known as the premium channels on most cable systems?

A. That is correct, sir.

Q. They are also available through satellite broadcasts directly to individuals who own tv. dishes or satellite dishes?

A. That's right, sir.

Q. Would you tell me what the fees that are listed here—the costs listed here represents?

A. The prices quoted on this list are the prices to the individual who has the backyard dish. This is the amount they would pay to the program provider for this service.

* * *

[674] MR. ZAKRZEWSKI: Your Honor, I don't quite understand. Is the National Cable Television Association the folks that charge these fees?

A. No, sir, those are the—if you'll see the 800-numbers on there. The numbers that the individuals would call to get that service directly from the service provider.

THE COURT: If you had a dish yourself. A satellite dish.

MR. ZAKRZEWSKI: And, there are the fees that you would have to pay, and they'd be bound to give you this service at this fee.

A. Yes, sir, I would assume so.

* * *

[675] BY MR. SAYRE:

Q. All right. There are certain terms of art that have come to be used [676] in the cable industry. Would you describe for the Court what a SMATV or S-M-A-T-V is?

THE COURT: First, what does it stand for?

A. It stands for Satellite Master Antenna Television.

THE COURT: Why don't we talk that way then?

MR. SAYRE: All right.

BY MR. SAYRE:

Q. What is a—would you describe for the Court what a System Master Antenna Television system is?

* * *

A. My understanding of that term is that it is a single antenna which distributes—from which television signals are distributed to a number of sets, monitors, or locations.

Q. But generally within one continuous piece of real property, such as a trailer park?

A. Yes, sir.

Q. Or an apartment house?

A. Yes, sir.

Q. What is a Community Antenna Television System or a CATV?

A. My understanding of that is this would be a broadcast antenna like the antenna you would see on a residential roof, but you would see it at [677] like an apartment house, but this would receive broadcast signals again to be distributed to a number of locations.

Q. And, what is a Pay-Per-View or PPV service?

A Pay-Per-View is a term applied to television programming for which the individual may subscribe for that one single event or one movie. As an example, some of our cable systems in the state are fully addressable in that they can send a specific signal to a specific location. They, in turn, offer pay-per-view where an individual can call in and order the movie on one night, rather than paying the fee for, you know, the whole month.

Q. What are the—what is a satellite broadcast of these—well, of any electronic signals carried by a cable system? How is it done? How does it occur?

* * *

A. A cable operator. Normally most of the signals come in from satellite—what they call a geo-stationary satellite out in space down link. The signal comes down to the dish that we're all familiar with. It's then run through a seriess of amplifiers and modulators to place the signal over a wire, which then conducts the signal to a house or the subscriber. Another form of reception for the cable operator is where you would receive your standard broadcast television stations. You know, this wouldn't be from space orbit.

[678] Q. In—I hand you what has been marked as Plaintiff's Exhibit Number Three, and ask you if you can identify that.

A. This is a listing also received from—by way of the National Cable Television Association in Washington of unscrambled satellite services, which can be received any any earth station without any additional deciphering unscrambling equipment.

Q. Are all of these services available to cable system operators to put on their cable systems?

A. Yes, sir.

Q. For a fee?

A. Yes.

* * *

[679] Q. Plaintiff's Exhibit Number Three, Mr. Blount, represents the variety of services that could be put on a system?

A. Yes, I should point out at this point, sir, that the difference between this listing and the other listing that we—in Exhibit Two—is that all of the scrambled programming in Exhibit Two, the backyard subscriber must also have a descrambler piece of equipment in order to receive one.

THE COURT: In Exhibit Three, you don't need one?

A. In Exhibit Three, you do not need one.

Q. How many channels does the average system or what do they range in Arkansas? You said they ranged from a hundred and fifty up to I forgot how many thousands.

A. It's infinite depending upon the number—on how sophisticated equipment they want. The average system in Arkansas on the average offers about thirty-two channels of programming.

Q. But there are more than thirty-two separate services available?

A. Far more.

[680] Q. So there has to be a picking and choosing of what is put on?

A. There certainly does.

Q. What is the smallest number of channels that you know of?

A. The smallest number that I'm aware of is twelve.

Q. And, the largest number of channels available?

A. I believe about—well, they say sixty-four, but I don't know of anybody that's offering sixty-four channels of programming.

Q. Are the members of the Arkansas Cable Television Association, who are cable system operators, charging and collecting the sales tax since July 1st?

A. Yes.

* * *

Q. Mr. Blount, have you ever personally participated in any original programming by a cable system operator in the State of Arkansas?

A. Yes, sir.

Q. Would you explain to the Court what your personal participation was?

A. The most recent was during the special session of the Seventy-six [681] Assembly. We did from the studios of Storer Cable here in Little Rock a nightly wrap-up of the activities of the day at the State Capitol. A program which I hosted and moderated.

Q. And, was that program shown on cable television systems in the State of Arkansas?

A. Yes, it was. We broadcast it live at Six-thirty each evening over Storer Cable, taped it, rebroadcast it again at Eight O'clock in Little Rock, and in North Little Rock, Jacksonville, and Sherwood. We made copies of it which I distributed to about six systems in the State which showed it the next day.

Q. Are there other instances of original programming by cable system operators of which you are personally aware?

A. Oh, a great many.

Q. Would you describe those that you have personal knowledge of to the Court?

A. Oh, my!

Q. Well, a few to satisfy Mr. Zakrzewski that you know of the types of programs.

A. Well, a good example here in Little Rock is the Black Access channel. There's a whole studio available which shows nothing but that sort of programming from here in Little Rock. The cable system at Hamburg, Arkansas, goes out with a little hand-held camera and tapes the high school football games on Friday nights and shows them again on Saturday. I've seen those videotapes.

Q. What about Christmas parades and those types of things?

[682] A. Oh, just you name it. Happy Birthday announcements. Any number of—

THE COURT: (Interposing) Wouldn't you say that the most common though would be a local weather bar that rolls around and advertising and that sort of thing?

A. Yes, sir.

Q. Are there community bulletin boards or original—

A. (Interposing) Almost every system in the state has that kind of thing.

Q. Using the Riverside system here in Little Rock as an example, because we're here, are there public access channels in that system?

A. There's seven. About six or seven here on the Little Rock system alone.

Q. Would you describe for the Court what they are?

A. Well, there's a public access local originationn channel over which we broadcast our legislative wrap-up each evening.

Q. That's on Channel Two?

A. Channel Two. There's a Fine Arts channel which carries a schedule of Fine Arts activities and also broadcasts radio station KLRE as the Little Rock School District's radio channel.

Q. Is that Channel Four?

A. That's Channel Four. Local government access which broadcasts the city council meetings in Little Rock live and also tapes them.

Q. That's Channel Eleven?

A. That's Channel Eleven. There's the Black Access channel to which I [683] previous eluded. It's Channel Fourteen. Channel Nineteen is the Educational Access channel where they show the school board meetings. They can do those live or tape. Channel Twenty-eight is a local religious access where any religious organization can come and have their programming shown. University Access channel is Channel Twenty-nine here in Little Rock. The University of Arkansas at Little Rock has its own studios, and it does its own programming.

Q. Who provided the equipment for the University?

A. Storer Cable does.

Q. The cable system operator here in the City?

A. Yes.

Q. Mr. Blount, at your request, has a taped example of these types of original programmings been prepared for you?

A. Yes.

Q. Would you describe for the Court what you have requested and what has been produced?

A. I asked Storer Cable to put together a short, perhaps, five to eight minute tape which would show some examples of the types of local origination programming done by cable operators with particular emphasis on subject matter which might demonstrate the editorial discretion exercised by cable operators.

MR. SAYRE: And, I believe that that program is now loaded on the VCR, and I believe that the tape will run slightly over two minutes when we're finished, Your Honor. We would like at this time to mark that as Plaintiff's Exhibit Number Four and offer for the [684] Court and the counsel of record the example—the video example of the original programming done by cable system operators here in the state and that Mr. Blount can be cross examined and identify and discuss.

* * *

[685] MR. SAYRE: Your Honor, at this time, the Plaintiffs and Defendants' solicitors previewed the two minutes worth of the example of the original programming which has been prepared at Mr. Blount's request, and we would ask at this time permission to play that and offer it and offer it into evidence for the Court?

THE COURT: Gentlemen?

MR. ZAKRZEWSKI: Your Honor, * * * I would ask that I be allowed to voir dire the witness and ask him some questions concerning what—

THE COURT: (Interposing) You may do so.

VOIR DIRE

[686]

BY MR. ZAKRZEWSKI:

Q. Okay, Mr. Blount, when Mr. Sayre started questioning you concerning this tape, he asked you of your own knowledge if you knew about original programming. What do you mean by original programming of cable t.v. in your definition?

A. It can have two definitions. One of which—an example is our coverage of the Legislature. This legislative report that we did each evening in which we went into the studio of the cable television company, used their cameras, their directors, their equipment, and their cable to create this program on site and deliver it live and tape it for later transmission. That's one definition of original. The other definition of original programming is programming that either is created or occurs, which is broadcast only over that cable system, or only over cable television.

Q. In the case of the broadcast of the legislature, is that—was that broadcast under what would commonly be called the Government Access channel?

A. That was over what we call the Local Access channel. The local origination.

Q. Is that what—

A. (Interposing) Public access, local origination—no, that's not the government access channel.

Q. Okay, but is it one of those channels that is required under the cable television policy act that you mentioned?

[687] A. No.

Q. Would it be regulated as a public access or government access under that act?

A. No. The cable—the cable operator determines what goes over that channel.

Q. In that—in that particular program, did the cable operator have any input into the content of that program, or do he just tape it?

A. I, as executive secretary of the cable association was executive producer, and I determined what went on, what questions were asked, who the hosts were, who the guests were, and guided the discussion.

Q. Are the cable operators required by the local franchiser to provide any of this type of service?

A. It depends upon the franchiser.

Q. Okay, in this particular case?

A. I'm not sure what Storer's franchise calls for in this case. I doubt very seriously if the franchise—

* * *

THE COURT: (Interposing) I can't take Judicial notice of it, but I do recall the negotiations and what Mr. Bentley's paper printed. There were some requirements before the franchise was given to Storer, and that [688] be—along with some patrons of the City who requested certain things, and it was compromised.

A. If I might add, with regard to this particular program that we did, we weren't required to do that.

Q. And you know that in your own knowledge?

A. Yes.

Q. How do you know that of your own knowledge?

A. Because it wouldn't have been done if I hadn't stepped forward and said, "Let's do it".

Q. But, it's possible that some of that—that that went to fill some requirement, is it not?

A. It's possible.

Q. So, still then you do not know that that was not required for them to get that franchise, do you?

A. No.

* * *

[689] Q. Are you aware that Section 531 of 47 USC states that a cable operator shall not exercise any editorial control over any public, educational, or governmental use of the channel capacity provided?

A. I'm aware of that.

Q. And, are you aware that the same is true that they're prohibited from controlling any editorial control over any video programming or—under Section 532—for the commercial use of these channels?

A. I don't understand that.

Q. Okay, Section 532 of the Cable T.V. Act at Subsection C-1 states that the person—cable operator shall not exercise any editorial control over any video programming provided pursuant to this Section. And that's the Subsection to

Section 532. Section 532 deals with cable channels for commercial use. So, the cable operators are prohibited—

A. (Interposing) Yes, from that sort of thing, but that wasn't what we were doing here.

Q. And this isn't—even though it is a broadcast of the legislature, it is not a government access type of channel?

A. No, sir.

Q. What would distinguish that from a Government Access channel?

A. We have a Government Access channel, sir.

Q. But, how would that be distinguished? I understand you've got that.

A. This was—this was an editorial with straight journalistic reporting activities in the legislature. It was not a Government Access channel, in that it showed a city council, or an elected body, or any function other—

[690] THE COURT: (Interposing) The legislature didn't request to use that channel at this session to put that on there. Is that correct?

A. No, sir, that's correct.

Q. What about—you had on there about the University of Arkansas programming. Who is responsible for the content of that program?

A. The University of Arkansas staff creates the programming. It uses the staff with equipment provided by Warner Cable of Fayetteville. The programming wouldn't be run if the cable operators around the state didn't elect to run it.

Q. Is it run on Public Access channel, or what channel would it be run on?

A. I imagine it's probably—I don't know. I don't know the answer to that.

Q. There's also an Educational channel that that could be run on, is that correct?

A. Yes.

Q. Do you know who determines what programs are run on the public access and educational channels?

A. On the Public Access channels, the local cable manager determines what's run on it. On the Educational channels, I really don't know who determines what runs on that.

Q. Can you refuse to run programming on the Public Access channel?

A. I don't know. I don't know of any program that' been refused.

Q. So that your statement a minute ago that if the cable operator didn't choose run it, it wouldn't be run, is not quite correct in this case then, is it?

THE COURT: There are certain areas that the cable operator or manager, I'm sure, could decide not to run something if it were so offensive to the public or something of that nature.

MR. ZAKRZEWSKI: Well, we're not—you know, assuming we are not talking about obscenity programming.

A. I would—I would—I would—and again, this is my personal belief—

THE COURT: We are going to have to talk about obscenity. Your are talking about hate, hatred, antisemitic, racist.

A. The cable operator in Little Rock does not choose to run that agricultural report from the University of Arkansas.

* * *

THE COURT: Let her roll.

(WHEREUPON, A VIDEO TAPE WAS SHOWN TO THE COURT.)

FURTHER DIRECT EXAMINATION
[692]

BY MR. SAYRE:

Q. To your knowledge and experience as Executive Director of the Cable T.V. Association, is the two minutes worth of film or taped examples of original programming representative of the type and of the variety of the original programming done by cable television operators in the State of Arkansas?

A. Yes, it is.

* * *

Q. Are there certain news channels that are carried by cable systems that are not carried by broadcast systems?

A. Yes, sir.

Q. Would you give an example of that, please, sir?

[693] A. A good—probably the best example is C-Span.

Q. And, is that the government reporting or the news channel?

A. There are two channels both originating in Washington, D.C. C-Span—the original C-Span covers the U.S. House of Representatives, gavel to gavel, and then when they're not in session, with supplementary news broadcasts from Washington. C-Span II, which began, I believe, last year, covers the U.S. Senate under the same circumstances.

Q. At the present time, is the C-Span unit or company here in Little Rock?

A. Yes, they are.

Q. And what are they doing here?

A. They are covering the Southern Legislative Conference with sixteen hours a day live programming.

Q. And is that broadcast on wireless or only on cable systems around the country?

A. That's strictly cable systems, satellite delivered.

Q. We spoke of editorial discretion, and Mr. Zakrzewski asked you that according to the Cable Policy Act, the Public Access channels, the cable operator could not interfere with or censor in any way. What about the other channels, and what type of, if any, editorial discretion is exercised on the non-access channels on a cable system?

A. I'm not sure I understand.

Q. Well, what kind of programs—who makes the determination of what programs are put on?

A. The cable operator determines. The manager or the owner of the [694] system has a finite number of channels, and he has to determine which of these dozens of programming services he is going to carry on his system.

Q. And, he could carry any of those listed on Plaintiffs' Exhibit Two or Plaintiff's Exhibit Three?

A. Yes.

Q. And if the system only had twelve channels, he has to decide which to carry?

A. That's right.

* * *

CROSS EXAMINATION

QUESTIONS BY MR. ZAKRZEWSKI:

[695] Q. Your association doesn't provide any services, does it, Mr. Blount? Any cable t.v. services?

A. Provide any cable t.v. service, no.

Q. Have you ever operated a cable t.v. system as an operator?

A. No, sir.

Q. Do you, of your own knowledge, know how the cable t.v. operators decide what programming can be put on?

THE COURT: That is dictated in the market place obviously.

A. That is a function of the market place. I was trying to formulate my response, but that's—it is.

Q. Do you know if they would use surveys, or something of that nature?

A. Sometimes.

Q. Nielson type surveys?

A. Sometimes. In many cases, with a smaller system, it's strictly the tastes of the cable owner.

Q. But, he's going to put on t.v. basically what he thinks he can sell to his customers, is that correct?

A. That and what the customers desire.

Q. And what? I didn't hear the last of that.

A. That, and what the customers seem to desire as in the case of C-Span.

Q. Which is what—what they are going to pay—what they would be willing to pay for, is that corrrect? What they like is what they are going to pay for?

THE COURT: Probably his cost is involved too in purchasing the service.

[696] A. Yeah.

BY MR. ZAKRZEWSKI:

• • •

REDIRECT EXAMINATION

[697]

BY MR. SAYRE:

Q. Mr. Blount, may I ask you one additional question? Is the Community Communications Company a member of the association?

A. Yes, they are.

Q. How many companies—how many systems does the Community Communications Company have to your knowledge?

A. To my knowledge, about a half a dozen.

Q. Are they representative of the types of systems that are members of the association?

A. Yes.

Q. Throughout the State of Arkansas?

A. Yes.

MR. SAYRE: No further questions.

THE COURT: Mr. Blount, does every company have original programming in the State of Arkansas?

A. I have to qualify my response to that by saying that those cable systems which have the equipment and the facilities—

THE COURT: That wasn't my question.

A. No, sir, they don't. Not every system does.

THE COURT: Anything else?

MR. SAYRE: One question on that.

FURTHER REDIRECT EXAMINATION

[698] BY MR. SAYRE:

Q. Original programming would include, I believe, community bulletin boards and those types of things. Do all systems have those types of—

A. (Interposing) I don't know of any system that doesn't have something of that type.

* * *

JIM GUY TUCKER, a witness called in behalf of the Plaintiffs, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Would you state your name and address for the record, please sir?

A. My name is Jim Guy Tucker, 1000 Savers Federal Building, Little Rock.

Q. What is your professional employment, please sir?

A. I am an attorney at law, and a partner in the firm Mitchell, Williams, Selig & Tucker. I am also Chairman of the Board of Cable Vision Management, Inc., a cable television operating and management company with approximately thirteen thousand subscribers in the states Arkansas, Florida, and Texas. I also serve in my individual capacity as a general [699] partner of County Cable Limited Partnership, an Arkansas limited partnership, with approximately sixty-three hundred subscribers in Shannon Hills, Alexander, Bryant, Sherwood, Beebe, and the unincorporated portions of Pulaski and Saline County, although portions of our system have now been annexed by the cities of Little Rock and North Little Rock.

THE COURT: You didn't love that portion of your system though just because of the annexation?

A. No, sir.

THE COURT: Proceed.

BY MR. SAYRE:

Q. Is this County Cable Limited the system described by Mr. Blount as one of the cable system operators in Pulaski County, Arkansas?

A. Yes, we are a member of his association, and we operate in Pulaski and Saline County.

Q. Would you state for the record please your educational background?

A. I have a B.A. degree in Government from Harvard College.

THE COURT: Unless it has to do with cable, it doesn't make any difference.

A. I'm an attorney at law.

THE COURT: That's good enough.

BY MR. SAYRE:

Q. Have you served as Attorney General for the State of Arkansas?

A. Yes, I have.

Q. And a member of Congress from the Second District?

A. Yes.

[700] Q. You are presently engaged in private practice?

A. Yes.

Q. And in both of your governmental and private practice, you were aware of First Amendment to—the Federal Constitution's right to freedom of speech and freedom of press?

A. Yes, I have also done a—in that connection, a part owner and successful applicant for licenses from the Federal Communications Commission for FM radio stations, and originally was a part owner of Channel 16, a local independent television broadcast company.

Q. With regard to your cable t.v. experience, would you explain to the Court how you began it and when?

A. We began in August of 1983 building an area of northwest Pulaski County generally surrounding the Cityof Maumelle where no cable television existed, and have generally spread out since then. Typically, our services were placed in areas that had such a thin population that larger cable companies in nearby cities couldn't economically justify serving those areas as a small enterpreneurial type company, we could justify the construction costs and servicing of those areas. So, we went where other cable companies generally, for economic reasons, were not able to go, and starting in that small cluster, have surrounded the city and moved to the other areas that I have named.

Q. Were you personally involved in the financing and construction of those systems?

A. Yes, as an individual general partner in business, it has been my responsibility to obtain financing, make construction decisions, or [701] approve construction

recommendations, and make decisions on programming, and to approve or disapprove programming decisions. I hasten to add, I did that we a good bit of input from my wife, but we do make the initial decision as to what will be broadcast on the cable television systems which we operate. We operate those systems in Arkansas from five separate what are called headends, h-e-a-d-e-n-d-s. At each of those headends, there are cable television signals received through the dish which we are all familiar with out in the yard, or a combination of those dishes brought inside the system, and then retransmitted to the various subscribers.

THE COURT: Are they amplified or anything?

A. Yes, they have to be amplified and refined, and then along the line, approximately every mile or so, we have to have an amplifier, which keeps the signals up, very much like you would need to keep up pressure in the garden hose if it was too long. We have approximately three hundred and fifty miles of cable plant in the state.

Q. What services are offered on your systems?

A. Well, for those familiar with the Little Rock system, to which I am a subscriber of the Storer here, our system is essentially identical to the programming on Storer. We offer a basic program, a basic subscription, which contains approximately twenty-six channels of news, weather, and distant signals. For example, we carry WTBS, the Super-Station out of Atlanta, which not only has movies. It also carries news and the typical things a broadcast station, television station carry. We also carry WGN. We carry CBN—

[702] THE COURT: (Interposing) Chicago?

A. That's Chicago, that's correct, and the Chicago station is one of the stations we carry for a couple of reasons. One, it is a good entertainment value, but it also has a news

program format that comes on at about Nine O'Clock at night, which is an off hour when news is not otherwise available on broadcast television here. We carry Cable News Network and CNN Headlines News, C-Span. We carry the weather channel, which is not just a little rotating thing, but a twenty-four hour weather broadcast of weather conditions around the country. Some religious programming, and a financial news network, the arts and entertainment—

THE COURT: (Interposing) ESPN?

A. Yes, ESPN, which is primarily a sports network, and a typical cable package for basic. Then, in addition to that, we have a pay of Cinemax, HBO, Showtime, The Movie Channel, and the Disney Channel, which are ala carte services. We have made the editorial election to offer those as programming on our system. A subscriber makes the editorial decision on whether or not he wants one of those particular programs. We also offer on all of our systems south of the river something commonly referred to as pay-per-view. We do this through an addressable cable system, as it's called, and by that, I mean a subscriber can telephone our office and ask to see a particular selection of movies that are available on the satellite that week. We can take that particular movie off of the satellite and send it directly to that subscriber's home without sending it to all homes in that part of our system. So, in that case, the subscriber is asking to see a particular movie, or sports event, or [703] musical entertainment, or whetever it is, and we are sending it to that home, and theoretically to no other home.

THE COURT: How does it work?

A. It works through a capacity at our—a computer in our office, as well as a converter in the customer's home. The computer in our office is able to address and talk to, if you will, electronically the converter in the customer's home, and it can send that signal in a discriminatory manner strictly to

the converter that recognizes or is addressed by the computer in our office. Technologically, it's interesting that we provide that same service from our Shannon Hills office to our Texas system by phone lines. So, if someone at DFW Airport wants to watch Beverly Hills Cop, we send it to them from our little office out in Shannon Hills through this same addressable mechanism. But, the customer is making the election to see that. We make the election to offer that service. It's not something anybody forces us to do, and, indeed, none of our programming is forced upon us by anybody. As the cable owner, we decide what we will offer. For example, we elected not to offer the Playboy channel, and that was our editorial discretion in our system that we didn't want to offer it. So, we don't, and nobody can make us offer it. City councils can't make us offer it. The Quorum Courts can't make us offer it. We offer it. Now then, if somebody comes in and leases a channel from me, and I lease that channel to them, which I am required to do if I have channels available, I can't mess with what they put on that channel. Once they have the right to be on the channel, as long as they are complying with copyright laws and other—

[704] THE COURT: (Interposing) Obscenity laws.

A (Continuing)—obscenity laws and things like that, I can't say, "well, I want you to shorten that movie by thirty minutes." If HBO broadcasts a movie, and I would like for it to get over sooner, I can't interfere with transmission that HBO is sending them, and that's the provision of the National Cable Communications Act that counsel for the state was referring to. I am prohibited from interfering with matters once I have elected to put them on my station. Now, I can decide to stop carrying something too, and, indeed, some cable companies have done that, and PTL is a good example, where you just get fed up with the fund raising efforts or some of the material in something, and you elect not to carry it any longer. But having elected to carry it, I can't interfere with it's content once it's on there. Somebody said one time, "one man's fiction is another man's propaganda", and even a

movie may be expressing a political viewpoint or some other social viewpoint. You shouldn't mess with it once it is on there. We also carry, as part of our basic service, original programming. Our programming is much more limited than that which I know as a subscriber of Storer—that Storer provides. Storer has a vastly more sophisticated original broadcast operation than we do, but even in our small operation we do a number of things. For example, last year up at the Bryant—I believe the Bryant High School wanted to put on a news program, and Dwight Harlan, our Assistant Manager, invited them to use our channel, and so the high school students did a news broadcast from our headend of the community news down there in the area of their high school. We exercised no role in what they said, but we made that [705] available for them to express the news as they saw it. But, we also have a rolling-type community thing, such as Mr. Blount described, and that has everything from advertisements for things to sell to personal greetings, birthday greetings. Some people like to listen to police radio. So, one of our channels carries—we went out and bought a bear cat radio and hooked it up to the thing. People who like to listen to police radios can listen to police radio calls with a video overlay of local news. In Beebe, we have a two-way system, which is available to the college, to City Hall, and to the high school. None of them have put it in use yet, but it is there, and we put it in the system so if they want to do a direct broadcast, they can do so. It was not a requirement of the franchise, but it was an election we made to help make the system more attractive.

THE COURT: The election of the franchise or the franchise—that's a contract matter between you and the government entity.

A. That's correct.

THE COURT: That's not a requirement. That's contractual.

A. That's correct. The franchise is granted to us by the particular governmental authority, and it is granted so that we have the right to be on public rights of way. Were it not for the need to utilize a public right of way, I do not believe any franchise would be required, and that's why you have SMAT-V systems. SMAT-V systems are typically those systems which operate totally on private property, and because they need no access—since they are on private property—to public rights of way—

THE COURT: (Interposing) Such as Holiday Inn's, and places [706] like that.

A. Exactly. They don't need a franchise. But once you start crossing public streets and alleys and rights of way, you do. We are both on telephone poles—I say telephone, AP&L, First Electric Co-op, Southwest Bell. We are also buried in public rights of way, just as Storer, and this would be typical for all cable television companies. And at one time, the position was taken that you could not—you know, if a city wanted to prohibit more than one franchisee from coming in, they could do so. Cases in the last couple of years, particularly Preferred Communications case decided two years ago, I guess, have more firmly established the First Amendment rights associated with the right to be able to be in that public right of way unless there is some burden placed on the public by the presence of the system there. So, our franchise strictly goes to the right of way use and establishes some public standards, insurance, and so forth for what we have to carry in the way of insurance if we are going to be in that public right of way.

Q. Mr. Tucker, there are broadcast signals—wireless broadcast television signals broadcast in the area of which your franchises exist?

A. Yes, there are. We have the—what is known as Channel 2, the Arkansas Educational Network: Channel 16; and then the networks channels of 4, 7, and 11; in addition to

Channel 38 is received in some areas of our cable system. We receive all of those signals into our cable system, and rebroadcast them through our cable system.

Q. Must you carry them in your system?

A. No, we would not be required, and, indeed, the—what's known as the [707] "must carry rule" has been one of the areas of contention between the cable industry and the broadcast industry. How many signals do you have to carry that are off-air, and that issue is in a state of flux right now. But, generally the position, as I operate my cable company, is that I am not required to carry all of the broadcast channels I carry. Now there have been FCC rules in place that some other witness may be more familiar with. I am familiar with one aspect of it. If I put broadcast channels on my cable, which I do, and someone wants to be able to receive a broadcast channel that I am not carrying, I do have to provide them what's known as an A/B switch, which allows them to switch out of my converter and pick up the off-air on their home antenna without interfering with it. So, I must protect their access to that right.

Q. What is the average monthly bill for your subscribers?

A. We average about Twenty-three Dollars and Ten Cents per month in our system at the present time.

Q. Is your systems charges—is the system price sensitive?

A. Our experience—my experience since 1983 is that our subscribers are highly price sensitive. If we, for example, do a rate increase, I may see an increase in my average bill for about a month as a result of that rate increase, and I will then see a drop in my revenue back down to about that Twenty-three Dollar and Ten Cent level as the customer either sheds services—for example, drops one of his pay

services—or else I have customers simply stop taking cable because I went over a magic line that is in their gut and in their mind as to how much they are going to pay for the information they receive over cable, and our experience in our company [708] has been that it's quite price sensitive. It does seem to stay up with inflation, but that's about all.

Q. With regard with the inquisition of the sales tax beginning July 1st, h[illegible] any of your systems experienced cancellations because that imposition of the tax to your knowledge?

A. We have had customers who have specifically cited the sales tax as the reason for their dropping cable services.

Q. The litigation you spoke of with regard to cable television has to do with the mandatory access rules, the "must carry" regulations, these types of things. There has been a tremendous amount of litigation in the Federal Courts over the last ten years—fifteen years, over cable television, has there not?

A. Yes, that's correct, and probably the case that really got, in my view, the ball rolling on analysis of cable and First Amendment rights had it's inception out of Little Rock, Arkansas. A company called Midwest Video, which George Morrell was president of and operated from the Tower Building down here, challenged some of the regulations being imposed on content of cable television. The Eighth Circuit, in a case I'm sure all the briefs will cite, affirmed the cable television operator's right not to have people interfere with his programming, and likened cable television to newspapers in terms of their content. I hasten to say not all Courts have made the same analogy, but at least in the Eighth Circuit—it's been the view of the Eighth Circuit analogized cable television with newspapers.

Q. What are the cable television operators activities that are protected [709] by these First Amendment rights of free speech and free press?

A. Well—

MR. ZAKRZEWSKI: (Interposing) Your Honor, I'm going to object to him answering that. That's a legal conclusion.

THE COURT: He can have opinion. I don't have to follow it, but he is certainly entitled to an opinion.

MR. ZAKRZEWSKI: I don't think it's evidence—

THE COURT: (Interposing) He hasn't been qualified as an expert, but that doesn't have anything to do with it. He is entitled to have an opinion on it himself. Proceed.

MR. ZAKRZEWSKI: I object.

A. I'll speak as a cable operator and a cable viewer, and based on my experience also as an attorney in this area, I feel very, very strongly about the fact that the business we operate is very much like a newspaper or magazine. We have these channels out there that are available. We can put as many as—we could put as many as a hundred channels on. Our system currently carries thirty-six channels. We can easily upgrade to over fifty channels. We have a wide selection of programming on there, and as the owners of the system, we make the decision as to what's going to be on those channels. Now obviously, our decision is governed very heavily by the subject matter that we believe our viewers are interested in, and if we have viewers clamor for a particular program—for example, we had them want Channel 38 carried, because I think that is the channel that carries the St. Louis Cardinals games, and that was important to them. They wanted to see it. We've had people demand certain religious [710] programming they wanted to see, because they otherwise could not have access to it. But, we have the final say so, and we try to be responsive to our viewers just very much as newspapers, and I guess, broadcast television stations try and adjust their

programming and their newspaper format to that purpose. It has been my view that no one has the right to restrict what we carry, or to insist that we carry things with a possible exception of this area carrying some broadcast signals. There are some other public policy reasons involved in that. But, certainly outside the broadcast signals themselves, our right, and my view of our right, and my strong feelings about our right is that nobody can tell us what we can or cannot carry, or should or should not carry; that in the spirit of free enterprise that is applicable to newspapers and broadcast television, we carry a smorgasbord of what we believe our viewers would like to see and would find of interest, and we try and have a wide diversity of programming available.

Q. You indicated that you believed that your cable system competes with newspapers. Would you be specific in examples of what you—how you compete?

A. Competition with cable is focused, I think, in a number of areas, but I will pick two where it is most noteworthy, Newspapers is one. There are many—I think it is a well accepted fact that people don't just get their news from newspaper reading, but there are days when I can't see the newspaper or read the newspaper, and I go to CNN, CNN Headline News, or WGN-9 for my news content, and it's my experience that a heavy number of our viewers [711] rely for news information on the signals they get over cable television, and not on newspapers or something else. But newspaper is a clear alternative to them for that same news content, perhaps presented in a different format, but they can read about the activities in the—off the coast of Iran in the newspaper, or they can watch it on CNN, or WGN Channel 9, or WTBS, and that's a choice they can make, and it's a competitive factor. In terms of broadcast television, it is a highly competitive factor, because broadcast television not only carries news, it also carries a wide range of other entertainment that is directly competitive with cable, and if people think our rates are too high, they will just switch to broadcast television. Satellite programming also competes

with us directly. People who have private back yard dishes can receive signals off the satellite that are essentially identical to what we receive and retransmit. If they want to invest in the satellite dish, they do get a descrambler, but we are a retailer, if you will, of that program. For example, a satellite dish operator, or rather owner, can come to our cable t.v. office and subscribe to HBO, and we will do the billing for them, and they will pay us, and we will forward the money to HBO. Now, that's not a cable television service I am providing, it has—you know, they are not getting any signal from me. I am simply serving as a gathering point for HBO on the revenues, and I bill them Eight Dollars, which is less than I bill my cable customers, because I don't have as much overhead associated with that task, but they can rent it from me, and I will take care of all the billing on it. The—

Q. (Interposing) Excuse me, Mr. Tucker. With regard to that particular [712] transaction or retailing of that particular service, HBO, Cinemax, whatever the premium channel is, do you have an obligation to service the decoder or to do any other function for the—

A. (Interposing) We will sell them the decoder, and if we sell them the decoder, we will provide service to it, and we'll also provide service to the dish. Again, it's not a cable television service, it's just—

THE COURT: (Interposing) You're in a business.

A. Yes, it's just a separate business we do.

Q. When do you make those billings, your County Cable would not impose a sales tax on that particular transaction?

A. The recipient of dish services that we—whether we are providing support service for it or not—does not pay sales tax on that service. If he gets the same service over my cable, he'll pay a sales tax. Now then, whether or not I am supposed to pay a sales tax on the HBO revenue I collect for

that dish owner beats the heck out of me. I don't know the answer to that right now. It's not a cable service. So I don't think it is subject to the sales tax, but I honestly don't know. What I do know is that the satellite dish owner can receive exactly—essentially the same programming that I am providing, and his providers don't pay any sales tax on it, and I do pay the sales tax on what—or my customers pay a sales tax on what they are receiving from me.

Q. As a cable television system operator and owner, would you tell the Court why you have objected to the imposition of sales tax upon the service you provide?

A. I recognize the government has revenue needs, and we certainly don't [713] mind paying to support the governmental structure that exists in the state or in the country, and we think that's a duty of all systems, and I think every cable television operator feels that way. And, we do pay franchise fees that are rather substantial; three percent of our gross revenue. The—but the tax that's been imposed in this case is unlike, for example, the taxes that my companies pay in Florida and Texas. In Florida and Texas newspapers and advertising, which supports broadcast television, are taxed as well as our cable system is taxed, but under the tax adopted here in Arkansas, other forms of First Amendment protected communication, with which I am directly competitive are not taxed. So that if you are a cable television customer, you're being assessed a tax. If you see the same thing on broadcast television, which I rebroadcast, you don't pay a tax. If you read the same story in the newspaper, you don't pay a tax. If you get it on your home satellite dish, you don't pay a tax. So, I think there is a—I feel there is a direct discrimination that occurs as a result of the structure of the statute, and it discriminates between the communication that my company provides, and the communications being provided by these other entities with which I am directly competitive. We pay the tax, and they don't pay the tax, and that seems the very heart of discrimination.

Q. Thank you, Mr. Tucker.

MR. SAYRE: I pass the witness.

* * *

CROSS EXAMINATION
[714]

BY MR. ZAKRZEWSKI:

Q. Mr. Tucker, I would like to talk with you a minute about who you do compete with, and you testified in length that it is your feeling that you primarily compete with newspapers. Do you have any figures or studies that show the relationship between cable t.v. and newspapers that would indicate how you compete with them and how y'all are labeled?

A. No. I should say I don't believe I said I primarily felt I competed with newspapers; that that was one of the entities wich whom we compete, and I speak not only as a cable television operator and owner, but also as a cable television and newspaper subscriber. That is, personally, when I go in to make a decision on how I am going to get my news, I can get it from newspaper, or I can get it from radio. My children can read the comics in the newspaper. They can also watch the comics on television. They can read general interest articles in the newspaper, or they can watch general interest articles on television. So, I speak from personal experience, plus my own perceptions as a cable t.v. owner and operator. I have no statistical figures to support that with.

Q. And from that same point of view then, do you own a VCR?

A. Yes, I do.

Q. Do you ever go and rent a movie?

A. Yes, I do.

[715] Q. Do you think that you compete with the folks that rent those movies when you show movies on cable t.v.?

A. Some of—some of our programming is unquestionably directly competitive with video tapes. No question about that.

Q. How about going to the movies? Do you and your family go to movies?

A. We go to movies and I—movies do not seem to have an impact on our—speaking as an owner/operator, movies do not seem to have an impact on our cable television subscribing. As a—speaking as an individual, I don't think I would choose between having cable or having video tape. I might mix the two together, but I don't choose between them.

Q. I'm speaking of going to the movie theatre.

A. I'm sorry. I don't choose between having a movie theatre or subscribing to cable television. I might do the two together, but I wouldn't give up cable to go to movies, because cable—the movies don't have the news, and the sports, and the firing line, and C-Span, and that sort of thing. So if you restrict it just to the movie content of "Beverly Hills Cop" or maybe "The Living Daylights", which I went to see the other night, I might go to the movie now instead of ordering "The Living Daylights" on pay-per-view for my system in the spring.

Q. But, looking at it from the other side, from the movie theatre on the other side, don't you think there is some competition between them and that somebody might choose to have cable t.v. and pay for that rather than go to the picture show?

A. I don't know what the movie theatre owners would think.

Q. As an individual, if you didn't have enough money to choose to do [716] both, don't you think there would be some competition between you and the movie theatre—between you cable service and the movie theatre?

A. I would have to speculate on that. I would hope they would choose cable if that's the case.

Q. Well, we've done lots of speculating. I would ask you to speculate.

A. All right, what do you want me to speculate on?

Q. If you didn't have all the money to spend that you got, don't you think that would be a consideration as to whether you went to a movie or whether you had cable t.v.?

A. I certainly think cable t.v. is a better value than the movie theatre.

Q. I would agree with you, and I have had to make that choice and have made it in the past. But so from that standpoint, it would be pretty obvious that you would compete with theatres, is that correct?

A. From the standpoint of—

Q. (Interposing) From the standpoint of an individual having a choice to make, then cable t.v. and movie theatres are competing. They are competing for that persons dollar, aren't they?

A. I can agree as to video tapes. I really can't agree as to movie theatres in my view.

Q. You don't think that you have had any impact on the attendanceship at movies?

A. I think people go to movies for a different reason than just seeing the entertainment. They are getting out of the house. There is the popcorn and a certain social event to it. It's more like going—I think [717] going to a ball game or something like that. It is an out of home entertainment opportunity, and I, personally, do not equate the two as being competitive. Someone may have some statistics that show differently, but I don't see them that way. Video—home video tapes, I do.

Q. You don't think you compete with the ball games?

A. Again, I think the—one is an information and entertainment media delivered to the home, and ball games and movie theatres both represent out of home activities. Now, to the extent that everything competes for every dollar all of us have, because we have a wide range of options, you can say "yes, there is competition", but I can't equate ball games and movie theatres with the kind of competition that we receive, for example, from video tapes.

Q. Let's relate it to a specific example. Do any of the stations on your system carry Razorback football games?

A. Yes.

Q. Do they ever black those games out when they're played in the city?

A. I think sometimes Razorback games are played in the city that are broadcast in other areas that we don't have available here, yes.

Q. And why is that done? Do you have any idea?

A. I think it has to do with the contract protections that the people who buy the rights to the football games have. That is, usually in their contract, they prohibit showing the game locally.

Q. And, why would they want to do that?

THE COURT: Fill up the stadium.

[718] MR. ZAKRZEWSKI: Your Honor, I would ask him to answer that.

A. I would assume that it—

MR. ZAKRZEWSKI: (Interposing) I appreciate your answer, and agree with it, but I would ask him to answer it.

A. I didn't hear the Court's answer. It might have—

THE COURT: (Interposing) I said fill up the stadium.

A. I assume it is some type of economic interest. I don't know that they get—I don't really know who imposes that restriction, whether it's the people who are broadcasting the game, or whether it's the people who own the stadium, or whether it's the University of Arkansas.

THE COURT: It is the University of Arkansas. You may show our game, but only certain places, or we won't let you have a contract to show it.

BY MR. ZAKRZEWSKI:

Q. So, you don't really think you compete then with the theatres and athletic events?

THE COURT: You know, I don't know where this question goes in terms in light of the question before the Court?

MR. ZAKRZEWSKI: Well, Your Honor, they've put on substantial that he compete—or attempted to put on evidence that he competes with newspapers to show discrimination, to show a reasonably likelihood of prevailing, and what I'm going—my next question maybe will show where it's going.

BY MR. ZAKRZEWSKI:

Q. Mr. Tucker, are you aware that the rental of a video tape is subject [719] to sales tax?

A. I've been told that, and I think I pay a sales tax when I rent one, yes.

Q. And that a rental of a VCR is subject to sales tax?

A. I never rented a VCR, but I would assume that.

Q. Are you aware that the price of admission to a movie theatre is subject to sales tax?

A. I wouldn't be surprised, but I don't know that.

Q. And that admission to an athletic event is subject to sales tax?

A. I assume that's the case.

Q. And, Mr. Tucker, you explained to us your reason for disliking it is the discrimination and that you don't mind paying taxes. Does the utility pay any other ta t—I mean, does the—do y'all pay any other taxes other than the franchise tax that you mentioned that you are aware of?

A. We pay income tax, and use tax, property tax.

Q. How are you taxed for property tax purposes? Are you aware of that?

A. Yes, there's an alternative method of calculation. It is calculated by the State Public Service Commission. It can be based on value of the assets, as well as on your—the value created by those assets through receipt of revenues, and it is then in turn tied to the millage rates in each of the local school districts in which we operate.

Q. Is that rate higher, lower, or the same than rate of other businesses that operate in the area?

A. I think the approach to it is essentially identical across the board. It is somewhat unique in that our property tax is calculated by [720] the State Public Service Commission staff, even though we are not a utility. So, for example, I don't know how the property tax for Coca-Cola Bottling Company would be determined, and I cannot testify that it would determined in the same way that ours would be. I'm just not familiar with it.

Q. You don't know that it's an advantageous rate. Is that correct?

A. I would—

Q. (Interposing) As compared to other businesses?

A. I do not believe it is an advantageous rate at all.

Q. And, the Cable T.V. Policy Act doesn't prohibit the PSC from regulating you all in any other areas. Is that correct?

A. It's the Cable Communications Policy Act, I think, is the name of it.

Q. Whatever—47 USC 521?

A. Right, and I can get the name wrong too. The Act contains a number of specific prohibitions, including

prohibitions against certain types of taxing of cable television companies, that's true.

Q. Does your company do original programming? Mr. Sayre may have asked you that, but I didn't catch it if he did.

A. Yes, if by original programming you mean, do we originate transmissions at our headend site to our customers, the answer is yes.

Q. Okay, let me get more specific.

A. As opposed to taking them off of the satellite.

Q. Does your company sell—produce programming in that they take content that someone else—that no one else has put into a program form—put it into a program form and broadcast it?

[721] THE COURT: He said the Benton High School did.

A. The answer is yes, we do, and others do sometimes do it for us, and then use our facilities to direct broadcasting, but, for example, all of our direct transmissions on our little rolling thing are—Dwight Harlan goes back there and types it i n, whether it's information about a town council meeting; whether it's a description of the school menu; whether it's an advertisement, or a direction about—sometimes we have to black out for a particular purpose, and we have the right—we have not utilized it at this point—to go do an editorial comment on something, a political candidate, for example, or a community event. We have asked for programming. For example, we asked the Pulaski County Literacy Council to provide us a tape that we could run on their literacy program in the area, because a lot of people who have literacy problems do watch television, and that a chance to communicate. So, the answer is most of our stuff is actually prepared by somebody else or done in our office. It's all been at our invitation, or they've asked, and we've said

sure, be glad to, but some of it is stuff that comes out of the mind of Dwight Harlan or one of the other employees of the company.

Q. Could you give us an example or two of what comes from your people? Dwight Harlan?

A. Dwight Harlan is our assistant manager. Well, all of the—again, on the rolling cable cast there that we have that contains the community bulletin board, Dwight puts—types in all the messages. Now, some of the messages would be a direct message from—"Francine wants to say happy birthday to Judy Lee," but other messages or communications that we want [722] to have with our customers, those typically deal with programming services, or interruptions of services, or materials we are going to be carrying. For example, it's not uncommon for us to tell customers over that about some movies that will be coming up on pay-per-view. That's all done by Dwight, and he decides what he wants to put on, and puts it on it pursuant to the authority he has in management.

Q. How do you—how does your company determine what you are going to broadcast, or what you are going to put on your system, which channels, or which programs on a channel, if you can do that?

A. Well, as to the community bulletin board, we decided in much the same way a newspaper would decide. We decide what to type in, depending upon the needs of communication we have, or the things that we think are important. As to satellite programming we provide, it tends to be a blend of what we think our customers would want to have, and what we are willing to put on there, and Playboy being an example of something we've not been willing to carry.

Q. Do you do any surveys of your own to indicate what your customers want to see?

A. Yes, we have done that on occasion. The—we get a pretty regular survey by virtue of the various substantial communication between customers and what we call our customer service representatives, the people who are on the telephone down there. People call in and tell us they would like to see this program or that one, or they will complain [723] about programming if they it's got—usually it's an objection to violence or sexual content.

Q. Do you ever review programming before you make a choice to put it on or not?

A. Yes.

Q. Would you give us an example of that?

A. We've been solicited by some religious programming and by some cable channels that carry sexually explicit material where we have looked at either excerpts or written material on what's going to be in it, and made the decision we didn't want to carry it.

Q. So, you have actually then refused people access to your system based on content?

A. People have asked us to carry their programming, and based on content, we have declined to do so. That's distinct from someone who wants to lease a channel from us. The people who want us to contract, want us to pay them to carry their programming. That's the way it works. For example, WTBS, I think our rate right now is around Fifteen Cents per subscriber. Every subscriber we have, I pay WTBS Fifteen Cents for the right to carry them.

THE COURT: Per month?

A. Per month. They don't pay me for the right to be on my cable.

Q. So, it's different then if you pay them or they pay you?

A. Well, the—yes, there is a difference in that.

Q. Other than the flow—the direction of the flow of the dollars. Are you saying that you cannot refuse?

[724] A. If you are referring to the Cable Communications Policy Act, I think you're—and if you're not, I don't know what you are driving at.

Q. You have to understand, first of all, of my knowledge of that Act is very cursory, and that I don't—and it's based on reading, which you can understand, I'm sure, doesn't tell me much about how the thing works practically.

A. If—if—once HBO has entered into a contract with me to provide programming over my channel, I may not go in and interfere with their program content. There are two reasons I may not do so. One, is the Cable Communications Policy Act, and probably other Acts that prececed it, and the other are federal copyright laws, which would prohibit my inference with it. The same would be true with the other channels that I carry that have copyright protected material. If someone leased a channel from me, and we have had had a chennel leased from us in the past. It was a channel that was leased from us in Beebe, and we charged the—in this case, it was a church group that wanted to lease the channel, and we charged them a flat fee for leasing that channel, and we exercised no discretion over what they had in there after we leased it to them, other than to be sure that they complied with copyright laws, because we can incur personal liability in that case.

Q. So once they've leased it from you, then you don't control what they put on it, is that—is that what you're saying, in essence?

A. I believe I am prohibited from attempting so censor or control the content other than where it would interfere with the law, of people who lease channels from me.

[725] Q. Is the—are the terms of that lease, when you lease a channel, are they controlled by law, or is it a purely contractual matter between you and the lessee?

A. Well, to the extent that you're dealing with—with matters that may not be transmitted under federal law without doing certain things, copyright, or obscenity, or threatening language, or something, it can be controlled by superseding law. Aside from that, I think it's a matter of contract.

Q. Is your company joining in this lawsuit, Mr. Tucker?

THE COURT: What was the question? I missed it.

Q. Is your—Mr. Tucker, is your company—are you—do you intend to be a party to this lawsuit?

A. Well, I hope that we are a party by virtue of the class action request that's been made. I would certainly consider our company, and me, personally, an example of a member of the class.

Q. Your company does operate under a franchise?

A. Multiple franchises, that's correct.

Q. In the franchising system, how many—does the franchise system limit the number of systems that can be operated in an area, or exactly what does—what rights does that franchise give you?

A. The principle right it gives me is access to public rights of way.

Q. Does it give you any—any right to exclusive access to that?

A. No, it does not.

Q. So that there could be another cable t.v. company also given the same rights?

[726] A. Absolutely, and indeed—

THE COURT: (Interposing) Is the franchise a one shot deal, or is it year after year?

A. All of our franchises are—were originally fifteen year franchises with the right to renew for fifteen years, and in seeking all of our franchises, I toldd folks I wasn't interested in exclusive franchise. I thought there were difficulties under the antitrust laws, among other things, with exclusive franchises.

THE COURT: I was thinking about—once you have access to it, do you have to pay every year to keep that access?

A. I have to pay a franchise fee every year of three percent to—which is limited by the Cable Communications Policy Act. A municipality may not charge a rate in excess of, I believe, it's either four or five percent to a cable company, and the reason was some areas were trying to charge franchise fee rates that had nothing to do with the possible expense to the city of use of the public rights of way.

THE COURT: Revenue raising, in other words?

A. I think they were trying to move to a revenue raising sense. That's exactly it, Your Honor. There was an effort to move to a revenue raising mechanism, as opposed to essentially an offsetting cost of use of the public facility.

BY MR. ZAKRZEWSKI:

Q. A couple of final questions, Mr. Tucker. Would you say that your choice of programming is primarily what your customers want to see? You try to determine that, is that correct?

[727] A. I think primarily that's true, yes.

Q. And, that means what you need to consider is you need to show what they'll pay for? Pay you to let them watch over your system, is that correct?

A. I'm sorry. You're going to have to repeat the question.

Q. Well, you're—you're charging them for a service just like a lawyer does. Right? It's just an assortment of services of different services, and you are trying to give them something that they want, and they are willing to pay you for it.

A. See, lawyer services are exempted from the sales tax, I think. So I can't compare it exactly.

* * *

Q. My simple question is, isn't your choice as to what you are going to put on your system dictated by what your customers are willing to pay to see?

A. In part that it would be true.

[728] Q. In large part, is that correct?

A. Well, no, I would say in part that is true. Obviously, I need to provide something they want to buy. If they don't like it, they won't buy it. Like a newspaper or a broadcast station, if they don't like the program content, they won't read it or watch it.

THE COURT: And what you can afford to buy and sell to them.

A. Well, that's the point. There are other considerations beyond what you have mentioned.

Q. But, unlike a newspaper, you don't sit there and give them editorial content that will make them unhappy, do you?

A. Well,—

Q. (Interposing) As a matter of fact—

A. (Continuing) my recollection of the local newspapers are that they daily provide editorial content that will make people unhappy.

Q. That's exactly the point.

A. As well as editorial content that makes them happy, and I think our cable television company is exactly the same. There are people who strenuously object to the material we carry on some channels. They continue to subscribe to cable television, because they want to watch the material on other channels. There are—there are cable t.v. channels which I carry on my system, which I personally find very objectionable, but other people like them.

Q. Are they general access channels or premium channels?

A. No, absolutely not. The—there are—and I'm thinking of some of these people who are constantly out there trying to raise money over my [729] cable t.v. company, and I've got a hesitation about it, and I don't watch those channels personally. But there are other channels that the people, who do enjoy some of these religious channels, detest, and they continue to subscribe to my t.v. because—my cable system, because they like the religious

programming, and in that respect, we are very much like someone who has a magazine. They may read some pages of the magazine, and skip all other pages all together. They look for the material that is of interest to them, and that is—that was part of the original appeal of cable television was to provide this diversity of programming so people would have a wide range of choice that was not available over broadcast television, even where broadcast television was available.

Q. So that you—even with the religious programming though, then you do have another segment that will watch that that might not watch something different?

A. That might not watch—I think, Showtime has movies one night of the week that have a lot of sexual content in them, and I would think that the people who object to that are sometimes the people who like more of the family oriented programming. Some people like to subscribe to the Disney Channel, and they don't want Showtime. Some people like to listen to our Bearcat radio receiver.

Q. How many customers did you have drop your service because of the sales tax?

A. I do not know that, and it would not be a traceable event. I understand, as I testified, that we've had some customers who have specifically objected to the sales tax. It shows up on our bill as a [730] separate item, and it wasn't there before June the 30th. So they can identify it.

Q. How did they express their objection?

A. By telephone comment to the—we have a converter in their home. So when they discontinue their service, we keep a record of why people have discontinued service. We routinely have them, as a matter of the conduct of the business, ask them why they are disconnecting.

Q. And your records will reflect then that this person called, and that his—he had his service disconnected for that reason.

A. There should be—yes, there should be records of however many people there were who specifically cited that as a reason.

* * *

REDIRECT EXAMINATION

BY MR. SAYRE:

Q. One thing, Mr. Tucker, we talked about your signal being within the broadcast—or your system being in the broadcast area, and if the programming becomes too expensive—your programming or cost—they simply cut it off and go back to the other programming. Would you explain to the Court, are your—let me ask you this, are your rates controlled under your franchise agreement? Do the cities or the governmental units set your rates?

A. The—the cities—Beebe, for example, initially in it's franchise, attempted to retain rate control authority; however, the National Cable Policy Act revoked the rights of governmental units to regulate rates. So, they may not regulate them where there is, in the words of the statute [731] "effective competition". Effective competition has been defined by the Federal Communications Commission as that area where there are at least, I believe, it's three off-air broadcast signals within the grade B contour of the cable subscriber. So, for example, in the Little Rock area, where we have at least five off-air broadcast stations, there has been a determination based on the presence of the signal level of three or more off-air broadcast stations. A determination made that our system is subject to effective competition, and because it is subject to effective competition, we have no rate regulation. And that—

Q. (Interposing) So, you—you have the right to set your rates at what the market will bear? It's subject to the marketplace then?

A. That's correct. That's correct.

Q. All right. What about instances in which there is not this effective competition? May rates be controlled?

A. In areas where there is not effective competition, as is currently measured under law and FCC regulations by the number of broadcast signals available, rates may be regulated.

Q. Inn the areas where there is not effective competition, is the consumption of cable services greater than in the areas in which there are effective—there is effective competition?

A. Oh yes, cable television systems were initially instituted, as Mr. Blount indicated, in areas where there were no off-air broadcast signals available, and so for example, in a typical mouuntainous area, sixty or more miles distant from a station from like Channel 4 or Channel 11 here locally, you might see a cable penetration of eighty or ninety percent. [782] There may be some areas down in Southeast Arkansas the same way, and by penetration, I mean the number of subscribers you have compared to the number of homes passed by the cable t.v. plant will be eighty or ninety percent or more of the people there. Now, by contrast, in an area like Little Rock where there is lots of off air broadcast available, we would anticipate a forty to fifty-five percent penetration because of the competition essentially from off-air broadcast facilities. So, whether or not we have competition is measured by the federal government for rate regulation purposes directly by the number and signal strength of off-air broadcast that's available in the area.

* * *

RECROSS EXAMINATION

BY MR. ZAKRZEWSKI:

Q. So, the effective competiton, according to this law, is the other t.v.—the free t.v. stations in the area? Is that what they are measuring?

A. For purposes of measuring whether or not we will be rate regulated, the Congress directed the Federal Communication Commission to determine whether a—what cable television companies were subject to effective competition. They delegated that authority to the FCC. The FCC has determined that effective competition is measured by the number of off-air broadcast stations in an area generating a certain strength signal level, and if that number and that signal strength exists, then we're subject to effective competition, and no further rate regulation—or no rate regulation is permitted. Now, Congress did not specify the off-air [733] broadcast signal as the competition. It merely said determine effective competition. The FCC determined that the— that rate regulation should be measured on this standard I have described.

Q. What is an off-air broadcast?

A. That would be your network stations, or independent stations. Here locally, it would be Channels 4, 7, 11, 16, and 2. I don't believe Channel 38 has that signal strength here, although I may be mistaken on that. In some markets where we operate, there is ten or twelve or thirteen off-air broadcast stations.

Q. So, it's competition, not so much in an economic sense, but in a—what sense is that in? Do you sell advertising?

A. Yes.

Q. Where do you run it?

A. We run it on cable. We run it both on the channels that have been described in various ways here, but our origination channels and the headend, if somebody wants to—we might say "the Blue Hill Garage has a special on tires this week," and we'll advertise that.

Q. You're talking about my kinfolks.

A. Okay. If we've got a—well, we do not have what's called an "insert capability". We hope to install one. I think Storer has it, where you can actually insert video tapes into the middle of an NFL game, for example.

THE COURT: They do.

A. And you hear a—you may hear a little beep-beep-beep just before certain programming, and that is a computer signal to that device, which [734] triggers a local insert on the thing. So, yes, we do sell advertising.

THE COURT: Does this satellite give you breaks in those systems?

A. The programmers do, yes.

THE COURT: I assume they charge you for that right then?

A. Well, they pay us, because—the advertiser is paying us.

THE COURT: I understand, but what I'm saying is, if on CNN you get the three beeps and then comes Bale Chevrolet's advertisement—

A. (Interposing) There is compensation made for that between the advertiser and the cable company and—

THE COURT: (Interposing) CNN?

A. CNN.

THE COURT: That's what my question was. Proceed.

BY MR. ZAKRZEWSKI:

Q. Okay, then do you have any studies, or are you aware of any studies—I'm sure you don't have the figures—but would relate revenues that are attributable, or compare rates between people who subscribe to your service as opposed to people who subscribe to a newspaper or one of your other competitors, and the effect of a rate increase on one or the other?

A. No.

Q. As they relate to each other?

A. No.

Q. Okay.

THE COURT: Are you taxed on your advertising you sell and those services?

[735] A. I don't believe—if I am, I haven't been paying it. I am not aware of an advertising tax in the state.

THE COURT: I was just asking.

* * *

PAUL GARDNER, JR., a witness called in behalf of the Plaintiffs was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Would you state your name and address please, sir?

A. My name is Paul Gardner, Jr. I live on Highway 81 North in Monticello, Arkansas.

Q. Are you the owner or one of the owners of Community Communications Company?

A. Yes, I am.

Q. And, would you explain to the Court what Community Communications Company is?

A. Community Communications Company is a family held corporation located in Monticello. We operate six cable systems out of our Monticello office.

Q. How long have you, personally, been involved in the cable business—[736] cable television business?

A. Our company is a family held corporation. We went into business in '72. At that time, I was president of our corporation. About six years later, I took over complete operations of our company.

Q. You've sat in the courtroom and heard Mr. Blount and Mr. Tucker testify to the operation of cable systems in Arkansas.

A. Yes, I have.

Q. Do you agree with their characterizations? Are there any differences in your system that you feel that were not touched on by those two witnesses?

A. No, sir, we carry pretty much the same operations. We do operate a broad spectrum of systems, I guess. We have—our largest system has about three thousand subscribers, which is Monticello. Our smallest system has a hundred and nineteen, which is actually the two towns of Tiller and Reed. So we have other systems that are in between that subscriber size.

Q. In the city of Monticello, is Community Communications Company's television services subjected to more then one local sales tax?

A. Yes, sir, we have a county sales tax, and we just recently passed a city sales tax in the city of Monticello.

Q. So, you are required to collect a six percent sales tax?

A. Effective the first of August.

Q. What capacity do you hold in the Arkansas Cable Television Association?

A. I was elected President of the Arkansas Association this year.

[737] Q. Did the—the Association is a party plaintiff in this action. Can you tell the Court how the Association decided to bring this suit—to be a plaintiff in this suit?

A. We, after deliberation, felt like it was an unfair tax that we had been singled out from among the other mass communications media, radio, newspaper, television, and so forth.

Q. Did the board of directors of this association vote to institute this action?

A. Yes, sir, we had a couple of meetings, and then decided we should take this action.

• • •

Q. Do you consider that the company's six cable systems that it operates in your area of the state to be representative of the types of cable systems operated by other cable system operators in the State of Arkansas or typical?

A. Yes, sir, throughout the State of Arkansas, I think we have a cross-section of all of them.

• • •

CROSS EXAMINATION

[739]

BY MR. ZAKRZEWSKI:

Q. You stated that you compete with regular television stations?

A. Yes, sir, we have public access or regular television stations in our area, yes.

Q. And that the sales tax discrimination between you and the t.v. stations?

A. It's a form of entertainment that—(pause)—

Q. You sell advertising just like Mr. Tucker?

A. I have character generators available in my systems, yes.

Q. Do you pay sales tax on that when you sell it?

A. I have not been charging sales tax on the character generators.

Q. I don't understand how you think the sales tax hurts your competition with t.v. They don't—they are not charged on their advertising, and you [740] are not charged on your advertising. How will this effect your ability to compete with them?

A. I'm not sure I understand.

Q. Well, the only thing I'm aware of that you two do in common is you broadcast signals, and—but as far as economic discrimination, the only thing y'all do similar is you charge for advertising and they charge for advertising. That's the only—and neither of you are taxed on that. Is that right?

A. Right. Well, people don't have to subscribe to our service. They can receive those off-air channels in our area off the air.

Q. That's correct, but I don't see how you see that the sales tax effects your ability to compete with them, because they get them free anyway. Right?

A. Right.

Q. And they are willing to pay you to broadcast it to them in addition to the other services, and all this is going to be is an additional percentage on that price. I don't see how it effects your ability, or changes—changes your competition with them? Can you—I just don't understand how it does that. Can you explain that?

A. No.

* * *

[741] *JERRY BRYARS*, a witness called in behalf of the Plaintiffs was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Would you state your name and address please, sir?

A. Jerry Bryars, 34 Hummingbird Lane, Conway, Arkansas.

Q. And what is your professional employment please, sir?

A. I am Executive Vice President of operations for TCA Management Company for the State of Arkansas.

Q. Would you explain to the Court what the TCA Management Company is?

A. We are a MSO, or Multiple System Operator, that operates in Arkansas

[742] THE COURT: What does TCA mean?

A. It's abbreviations for Tell Service Corporation of America. I'm sorry. I misunderstood the question.

Q. No, I think that's—you said it is an MSO, and this is a terminology, Multiple System Operator, meaning that you operate more than one cable system?

THE COURT: I just grew up speaking English. I don't speak in anachronisms.

Q. But, the—how many systems does TCA operate in the State of Arkansas?

A. We have eighteen office locations, and a great number more franchises than that in the state. Somewhere in the neighborhood of fifty franchises.

Q. So, those owuld be fifty separate systems?

A. Right.

Q. Does TCA operate similar multiple systems in other states and localities?

A. Right. Texas, Louisiana, and Idaho.

Q. And, it would be considered nationally a large Multiple System Operator, or a large cable company?

A. I believe we are ranked thirty-first in the United States.

Q. You have served as an officer of the Arkansas Cable Television Association?

A. Yes, I was President last year, and I now serve as past President/Board of Directors.

[743] Q. As a member of the association and as a cable system operator or manager, you have heard the testimony of Mr. Tucker, Mr. Blount, and Mr. Gardner here today concerning how their systems operate.

A. Right.

Q. Is there any substantial difference in the way that the TCA operates its multiple systems in the State of Arkansas?

A. We operate basically the same.

Q. And offer the same type of services?

A. Same type of service, yes, sir.

Q. Are some of your systems—you say fifty to sixty—in remote areas from broadcast signals?

A. Well, we operate basically all over the state. So we have systems as far north as Corning, Arkansas, which is, You know, pretty remote as far as from the Little Rock channels here.

Q. Do you supply Little Rock broadcast television signals to those remote locations?

A. Yes, sir, we do.

Q. Generally, through what form of technology?

A. Well, as far as Corning and Pocahontas, up in that part of the state, we serve the Little Rock channels through a microwave system, where we pick those signals up from the Jonesboro cable system, send them through a microwave hop to Stanford, split it there, and serve the Corning area and also the Pocahontas area. We also serve the Harrison area—Harrison, Berryville, and Green Forrest—through a microwave system where we pick signals up—Little Rock signals up in Mt. Judy, beam them from there to [114] Harrison through a microwave system, and also from there to Berryville through a microwave system.

Q. So, this microwave system can be used to transmit the signal around the state?

A. Right.

Q. As opposed to the satellite transmission?

A. Right.

Q. Is there a local microwave transmission similar to cable systems, or was there, at least in the past, a technology used in that same manner?

A. There are systems such as direct broadcast, which is a microwave system that you can do a number of services like HBO or something like that where you just beam it from a given location to—right direct to the subscriber's house.

Q. And the antenna—there has to be a specialized antenna for that?

A. Right.

Q. What would be the cost of that antenna?

A. I'm—we've never gotten into that particular part of the delivery, and it would just be pure speculation on my part to answer that.

Q. With regard to the delivery of the HBO services from the microwave transmitter, or broadcast transmitter, to the individual homes, as opposed to the cable delivery of HBO, what would be the difference with regard to the—to the signal received—I mean, the picture received by the user? Would it be the same?

A. To the best of my knowledge, it would be none. One is broadcast or transmitted cross country. The other comes from satellite.

[745] Q. The only difference would then be the one that is connected by cable, and the other one would be transmitted directly to the home by a microwave system?

A. Right.

Q. The—using the wire or the cable, you can actually under present technology put in more channels than you can by the microwave system?

A. You are limited with the microwave because of the higher frequency that the FCC allows you to use on the microwave part of it. Using a coaxial cable, you use a much lower frequency. So, therefore, you can stack a lot more channels into one given frequency space. So, you know, you can go on up into fifty, sixty, up to a hundred channels or so going through a coaxial cable.

Q. So, it's virtually unlimited, except for the size of the cable?

A. Right.

Q. As a member of the association and as the manager of the TSA operation here in Arkansas, did you vote positively to bring this suit?

A. Yes, I did.

Q. And what were the reasons you did that?

A. We felt like it was a discriminatory tax since it was—we're part of—we feel like we're part of the news media. Radio and t.v. broadcast signals are not taxed, and—

Q. (Interposing) What about newspapers and magazines?

A. Newspapers and magazines are not. We are part of that service also. We feel like we are.

Q. (Interposing) What about the—excuse me, the satellite broadcast [746] directly to the dishes?

A. Well, they are a part of that same service.

Q To your knowledge, are they taxed? Those services?

A. No.

CROSS EXAMINATION

BY MR. ZAKRZEWSKI:

Q. Who told you that magazines weren't taxed?

A. Well, there has been a lot of scuttle about the Arkansas Times.

Q. So, that's—you didn't know that if you go into a store and buy a magazine, don't you pay sales tax on it there?

A. Well, yeah, I'm sure you do on some—some magazines.

Q. What about movie theatres? Do you compete with them?

A. I wasn't aware that they were taxed. That was news to me.

Q. How about the folks who rent video tapes? Do you compete with them?

A. I was informed that they were taxed, yes. I, personally, have never rented a video tape.

Q. Do you compete with those folks?

A. Yes, we compete with video tapes. Yes, very much so.

Q. Do you think you compete with an athletic event if they charge admissions to that?

A. Well, if we were operating in Fayetteville, Arkansas, I guess, and we were permitted to carry the Razorback football game, we may be competing in one sense. I'm sure the University would like to sell out all of their seats before

they authorize anyone to carry their programming over t.v. I mean, [747] that's part of their funding as far as the University. So looking at it in that sense, I guess we would be considered.

Q. Imagine anybody driving from Corning to Fayetteville for a Razorback game?

A. I doubt it. Oh, I'm sure they are some.

Q. How do you decide what channels you put on your system?

A. It's basically based on how we feel, or what we feel our subscribers want. I mean, we get certain feedback—"I'd like to have Nickelodeon." I mean, we just listen to that. Basically choose and pick what we want to carry based on input from our subscribers.

Q. Do you review programs before you put them on to see if you think that is something that folks in your area ought to see?

A. Well, we want to know what we're putting on. Yes, we would review it.

Q. Do you provide—does your company do any programming where you sit down with your cameras and crew and decide you're going to put this on, and you go out and get the folks together, and make up a program and put on?

A. Well, we're—we do some local programming. Not us as cable operators. We—we're carrying some church services and things like that. They are live productions where we have leased out so many hours on Sunday, or—you know, some time, you know, that we charge a fee that they can air their church programming. It's based on more or less just a maintenance fee to recoup our cost in building the lines

for them and giving them access. As far as us doing any filming ourself and producing [748] it, we're not in the process of doing that. We've got some city council meetings and some things like that that are being aired over some of the cable systems, which—you know, we provided the equipment for them to do that. It's just something, more or less, we give to the community.

Q. Do you know of any specific instances where you've had any customers to drop cable t.v. service because of the sales tax being levied on it?

A. There was a few that claimed that they couldn't afford an additional cost. It wasn't explained that they objected necessarily to the sales tax, but they reached a point where they—that's all they could afford. They were on fixed income. We have one incident now that we haven't settled with a condo association where the builder on a bulk account and one group of people authorized to make payments for all, and they have declined to pay the sales tax. We haven't done anything about it as of yet, but we have letters from them where they say that—

GAIL PRICE, a witness called in behalf of the Plaintiffs [749] was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Mr. Price, would you state your name and address please, sir?

A. My name is Gail Price. I live at Route 3, Box 421 in Conway.

Q. Would you tell the Court what your professional employment is please, sir?

A. I am Manager of State Sales and Use Tax Office.

Q. For the Revenue Department of the Arkansas Department of Finance and Administration?

A. Yes.

Q. Is it under your supervision that the sales tax in question imposed by Act 188 of 1987 as collected?

A. That's correct.

Q. Are there both state and local sales taxes imposed in the State of Arkansas?

A. Yes.

* * *

[753] Q. On the satellite—you've been in the Courtroom today and heard the testimony by the other witnesses.

A. Yes.

Q. The satellite transmission of either radio signals, such as the [754] Arkansas Radio Network or the HBO, to a dish owner, there's testimony that there is a charge for that service. Is that subject to sales tax in the State of Arkansas? That service charge?

A. Say that again. I think—

Q. (Interposing) The HBO signal, I believe Plaintiff's Exhibit Number Two, was a listing of the scrambled services.

A. Right. Correct.

Q. And you can pay a monthly charge and have it unscrambled so you can receive it. I think Senator Bumpers has complained about the amount of the charge. But does that State of Arkansas impose a sales tax upon the providing of that service, that video service, to the individual owner or the amount he pays in gross proceeds. Is there a sales tax imposed upon that?

A. No, there is not.

Q. There is upon the delivery of that HBO program by a cable system, because of the provisions of Act 188 of 1987. Is that correct?

A. Correct, yes.

Q. Prior to the adoption of that Act, there was no sales tax imposed upon the providing of that service by cable television?

A. That's correct.

Q. There's no tax upon the sale of newspapers in Arkansas?

A. Basically, no.

Q. There is no tax upon the sale of magazines published in the State of Arkansas that are sold by subscription?

A. That's correct.

[755] Q. There is a tax, a use tax, imposed upon the sale of magazines by subscription if they are published out of state?

A. Are you talking about over the counter?

Q. No, out of state published magazines sold by subscription into Arkansas?

A. Yes. Yes, there is, yes.

Q. And there is a use tax on that?

A. There is a use tax, yes.

Q. And over the counter sales of magazines, whether they are published in Arkansas or not, are subjected to the tax—this gross receipts tax?

A. That's correct.

Q. Now, we've had some discussion about a System Master Antenna Television System called the SMAT-V, which is all on one property, such as a hotel, or apartment house, or a trailer park, and if there is a charge made by the owner of that system to the users, is that subject to sales tax in the State of Arkansas?

A. I would think so, yes.

* * *

[756] MR. SAYRE: Though Mr. Price answered the Interrogatories, I'm sure that Mr. Zakrzewski assisted him on the Request For Admissions, and I would ask Mr. Zakrzewski that we could simply stipulate to introduce as Plaintiffs' Exhibit Seven the responses to Request [757] Number 85, 87, and 88 with regard to House Bill 1031 in the Special Session.

MR. ZAKRZEWSKI: No objection.

* * *

CROSS EXAMINATION

BY MR. ZAKRZEWSKI:

Q. Mr. Price, on the HBO question that you answered, if that signal is provided through the use of a scrambler or decoder, which as I understand is a piece of tangible personal property, and there is a rental charge for that, would that charge be subject to sales tax?

A. The equipment, itself?

Q. The charge for the rental and the rental of that equipment?

A. Yes. Yes, it would.

Q. What about any other charges connected with the rental of that? Would that be subject to tax as part of the gross receipt?

A. Yes.

Q. Are the rentals of movie video tapes subject to sales tax?

A. Yes.

[758] Q. How about the rental of VCR's? A. Yes, they are.

Q. How about the sale of VCR's? A. Yes.

Q. How about the sale of television sets? A. Taxable.

Q. How about radios? A. Yes, they are taxable.

Q. How about a ticket of admission to a movie theatre? A. Taxable.

Q. How about a ticket of admission to a theatre for a live performance? A. Taxable.

Q. How about a sale of a record or audio tape? A. Taxable.

Q. How about admission to an athletic event? A. Taxable.

Q. Okay, Mr. Price if the Court—

THE COURT: (Interposing) What about these motels that say free television services? Is that taxable?

A.If there is no charge being made, there would be no tax due.

THE COURT: Well, where it's presumed though as part of the cost of the room. I mean, you'd really getting into a technical area.

A. We are taxing the room. So, we're getting it.

THE COURT: You are already taxing the room. So you are getting it. [759] A. Yes.

THE COURT: Proceed.

REDIRECT EXAMINATION
[766]

BY MR. SAYRE:

Q. Mr. Price, you stated that if a decoder was rented or leased, that it would be subject to sales tax, and if the service provided over the leased decoder, it would be subject to sales tax, I believe. Was that your testimony?

A. I believe that's correct, yes.

Q. All right, if the decoder is sold—somebody pays Three Hundred Dollars for a decoder, and it's sold. There's a one time sales tax on that, is that correct?

A. That's correct, yes.

Q. Thereafter, there is no sales tax imposed upon the providing of that HBO or ESPN service through that decoder from a satellite, is there? A. That's correct, yes.

[777] *MAYLON MARTIN*, a witness called in behalf of the Plaintiffs was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Would you state your name and address please for the record, sir?

A. Maylon Martin, 5804 Timberview Road, Little Rock, Arkansas.

Q. What is your profession or employment, sir?

A. Director of the Department of Finance and Administration, State of Arkansas.

Q. And you are a member of the Governor's cabinet? A. I am.

Q. During the legislative session, were you one of his chief lobbyists with regard to tax and revenue matters?

A. I'm not sure I designate myself as being a lobbyist. I am the person who for some reason has been designated to testify in revenue and taxation committees, yes.

Q. With regard to your testimony on the bill that became Act 188 of 1987, did you testify with regard to that Act?

A. I'm certain I did, yes, sir.

Q. The purpose for that Act is to raise general revenues, is that correct?

A. That's true.

Q. Is there any other compelling interest to be served by the adoption of Act 188 and the imposition of the tax on cable television service, other than the raising of general revenues?

A. Well, I can say there was original intent of spreading the base of taxation to provide additional revenues not only for now, but to spread the sales tax base so that there would not be a continued erosion of the tax base or general revenues for state government.

Q. But is was for general revenues? A. Right.

[779] Q. Not for any other purpose or interest that the state imposed a tax on cable television?

A. For general revenues. My point being that there was a consciour public policy decision made to expand the base of what we were taxing with sales taxes to not only provide additional revenue now, but to discontinue the erosion of the sales tax base in Arkansas.

Q. All right, but with regard to a tax being—this tax, this specific tax being imposed upon cable television service, is there any compelling interest of the state that would serve other than production or the generation of general revenues?

A. Well, the production of general revenues serves the purpose of keeping state government whole and of providing for services deemed to be appropriate and necessary by the General Assembly of the government.

Q. In the general running of the government? A. Right.

* * *

CROSS EXAMINATION

BY MR. ZAKRZEWSKI:

Q. Mr. Martin, did you project how much this tax would generate?

A. We have projected approximately Two-point-Six Million. The association, I think, during hearings, projected more than that. Closer to Three-point-Four Million, if I remember.

Q. And is that on an annual basis? A. That is on an annual basis.

Q. And, what percentage of general revenues would this tax represent?

A. Very small. Between one-tenth, and right under two-tenths of one percent of our general revenue.

THE COURT: The state? A. Yes, sir.

* * *

IN THE CHANCERY COURT OF PULASKI COUNTY
FIRST DIVISION
[956]

DANIEL L. MEDLOCK, et. al. PLAINTIFFS

vs. No. 87-2401

JAMES C. PLEDGER, Commissioner of Revenues; et. al. DEFENDANTS

CITY OF FAYETTEVILLE, ARKANSAS INTERVENOR

Testimony and other proceedings taken ore tenus at the Bar of the Court on the 9th day of May, 1988, before the HONORABLE LEE A. MUNSON, Chancellor, presiding.

APPEARANCES

FOF THE PLAINTIFFS,
Honorable Eugene Sayre

FOR THE DEFENDANTS
Honorable Joe Morphew
Honorable Robert Jackson
Honorable David H. White
Honorable Kaye JJ. Demailly
Honorable Robert Parker

[957] TESTIMONY IN BEHALF OF THE PLAINTIFFS:

BOB BLOUNT, a witness called in behalf of the Plaintiffs was examined and testified as [958] follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Mr. Blount, would you state your name please for the record?

A. My name is Bob Blount.

Q. What is your professional employment please?

A. I am Executive Secretary of the Arkansas Cable Television Association.

Q. Are you the same Bob Blount that testified earlier in this proceeding on August 19, 1987, concerning the operation of cable television in the State of Arkansas?

A. Yes, I am.

Q. Mr. Blount, I hand you what's been marked as Plaintiffs' Exhibits Number Eight and Number Nine and ask if you would identify those for the purpose of the record, sir?

MR. SAYRE: Your Honor, we also wouuld request that any testimony or exhibits offered at the preliminary hearing also be considered as part of the record in this proceeding.

THE COURT: They will be.

BY MR. SAYRE:

A. Exhibit Number Eight is a photocopy of—from the Arkansas Democrat issue of Saturday, April the 30th, 1988, which gives the television programming for that day available in Little Rock and North Little Rock.

Q. On the basis of local broadcast channels, cable channels and the—what's considered premium channels, the HBO, Movie Channel, Showtime, [959] Cinimax and the Disney Channel in this community?

A. Yes, this is the programming for what's broadcast and cable television.

* * *

[962] BY MR. SAYRE:

Q. Mr. Blount, I'd ask you to identify what's been marked as Defendants' Exhibit Nine, the magazine.

A. Exhibit Nine is a photocopy of page B-5 from the April, 1988, issue of Orbit Magazine. It's a national publication. This is a listing of the locations, identifications, and programming available on satellites in orbit for television program viewing by earth stations.

* * *

[963] Q. Mr. Blount, would you describe for the record please what the Orbit—Satellite Orbit publication is, and who it's publishers are?

A. Satellite Orbit is a news and information magazine published monthly for utilization by—primarily by the cable television operators and by over a million and half satellite dish owners, back yard owners. This is their program guide like you would get out of a newspaper, a daily newspaper. It tells them the location, where to point their dish for their programming, for people who are not on cable television.

Q. Is the—the double page spread of the guide, which is listed as Plaintiffs' Exhibit Nine, carried on a monthly basis?

A. Yes, it is.

MR. SAYRE: Your Honor, we would again offer Plaintiffs' Exhibit Nine for the limited purpose of showing the programming that is offered from satellite broadcast, on both a scrambled, meaning decoder, and an unscrambled basis. For that limited [964] purpose only.

THE COURT: You may introduce it for that limited purpose, not as to its accuracy or its truth and matter asserted in any way, but that there is a nagazine published monthly that goes out to a million and a half subscribers of cable dishes who uses that as a guide for determining what program they wish to watch. Now, that is perfectly acceptable. It doesn't violate the hearsay rule.

MR. SAYRE: Going back to Exhibit Eight then, Your Honor, we would—

THE COURT: (Interposing) And for that matter, the Democrat ad could go in.

MR. SAYRE: We would offer for the purpose—

THE COURT: (Interposing) Of showing that they do advertise—

MR. SAYRE: (Continuing)—the regular—excuse me, the regular programming that is—

THE COURT: (Interposing) Not for those programs, the ones that are going to be shown necessarily, but in fact they do offer them to be shown, or might be shown.

MR. SAYRE: And I think the Democrat has substantial circulation within this particular community.

* * *

THE COURT: For those limited purposes, they will go in over [965] their objection.

* * *

BY MR. SAYRE:

Q. Mr. Blount, as the Executive Director of the Arkansas Cable Television Association, are you familiar with the type of programming that is available for use on the cable system operator's systems or the channel programming that is available?

A. Yes, I just completed a survey of all the cable systems in Arkansas where I asked them to give me the programming that they provide and the channel assignments, and this will be published next week in our association directory.

Q. That same information has been made available to the State in answer to their interrogatories?

A. Yes.

Q. Would you describe for the record please what types of news programming are available for cable television system operators in the state of Arkansas to broadcast?

A. Specific programs, which are only satellite delivered, not available broadcasts, C-SPAN, which is an all news network coverage [966] gavel-to-gavel of the House of Representatives. This is owned and operated by a consortium of cable systems which provide this all news coverage.

Q. Are there more than one C-SPAN channels?

A. Two—there are two C-SPANs. At the present time in Arkansas, only C-SPAN-One is carried. C-SPAN-Two is gavel-to-gavel coverage of the U. S. Senate.

THE COURT: What does it mean? What does C-SPAN mean?

MR. WHITE: Cable Satellite Public Affairs Network.

THE COURT: That is just for the record.

MR. SAYRE: I realize the Court's admonition not to speak in acronyms, trying to satisfy that.

BY MR. SAYRE:

Q. Besides the gavel-to-gavel coverage of the Federal Congress, what other types of news programs are offered on the two C-SPAN channels?

A. Cable—on the two C-SPAN channels, there's also coverage of important news conferences, appearances at the National Press Club. There's also a call-in show, a nationwide call-in show where they have prominent individuals in government or economics. Our own Congressman Robinson had appeared a couple of times on it. People have called in nationwide with a question to get answers, live show.

Q. During the hearing on the preliminary injunction in this case, I believe the Southern Legislative Conference was meeting here in Little Rock at that time, and C-SPAN covered that also, did they not?

A. Yes, they did. It was live with the support of Storer Cable here [967] in Little Rock providing a lot of the back-up for it. But it was live coverage.

Q. So that—is that original programming that is produced for cable television only?

A. Solely for cable television.

Q. What other types of news programming are available?

A. There is Cable News Network, which originates with Turner Broadcasting in Atlanta, which is one hundred percent news.

Q. How long—excuse me—how many hours a day is the C-SPAN broadcast?

A. I think C-SPAN is on on eighteen hours a day, if I'm not mistaken.

Q. What about the CNN?

A. CNN is twenty-four hours a day.

Q. Are there other?

A. Yes, there is CNN's Headline News Network, which is a thirty minute summary of news worldwide, which repeats itself once an hour.

Q. Are there other specialized, let us say, news or weather services available for cable services?

A. Yes, there's the weather channel, which is strictly a cable service, satellite delivered, and it's twenty-four hours a day weather information. There is also a financial news network, which is Financial News, which has eighteen hours a day programming.

Q. Are there any specialized types of programming available with regard to medicine, the law professions, this type of thing?

A. Lifetime channel is strictly for health information, the whole person concept. That's a good example of specialized programming for information.

Q. Are there foreign language broadcasts available for cable dissemination?

A. SIN, which is Spanish language network. They just recently changed their name, but don't ask me what that is in Spanish. But that's—it originates from Mexico City, and it's all Hispanic, and it's carried, as an example, here in Little Rock on the University Access Channel.

Q. Is the news that is presented on these types of cable programming similar to news that is presented either in a magazine or a newspaper in the print media?

MR. MORPHEW: Your Honor, I object to that. This witness is not competent to testify as to the similarities between news presented on a cable t.v. program and what's presented in a magazine or newspaper. He has no knowledge whatsoever.

THE COURT: He could have personal knowledge of it, just as I could. Overruled.

BY MR. SAYRE:

Q. Do you read newspapers and magazines of a news nature?

A. Two newspapers and three magazines regularly.

Q. Do you—would you answer then or respond to the question with regard to the type of coverage offered by these news programs on cable television versus the news programs—excuse me, the news media and the print media?

[969] A. Two of the best analogies that I coiuld draw would be first of all with regard to this CNN—the full—where they have one hour news programs and this sort of thing. I would say this is very much like any of the major news magazines where they have time to go in depth on a given story. Generally speaking, a programming like Lifetime that I referred to would be like Readers Digest. A little bit of—you know, a great deal of variety to appeal to a broad range of people who are just not specifically news oriented. Probably the best analogy that just occurred to me is the analogy between Headline News Network and the newspaper. USA Today. Just get to the point, very concise, very pointed presentation of news.

Q. In some instances it would be the same, and in others it gives a chance to go into more depth?

A. Sure.

Q. I hand you what's been marked as Plaintiffs' Exhibit Ten and ask if you can identify that?

A. Exhibit Ten is the January, 1988 copy of Readers Digest magazine.

Q. Are you familiar with the Readers Digest magazine?

A. Yes, I am.

Q. Could you explain to the Court your understanding of what types of articles are published in the Readers Digest?

A. Big variety. The best example you could do is just read the titles of the articles. "Mamma Pulled The Load Alone", which obviously is a human interest article from Southern Magazine. "How To Teach Children To Behave", "Who's Making The Big Bucks", "Who Says Experts Are Always [970] Right". Great variety.

Q. Generally, are those original publications in that magazine, or are they republications of other stories that first appeared in other media, either newspapers or magazines?

A. I would hesitate to try to put a percentage on it, but a large number of these have appeared—as an example, "Help For Your Aching Back" appeared in Esquire Magazine in September, 1987. Obviously, it was purchased by Readers Digest to run in this issue.

Q. Is there advertising contained in that magazine? A. Yes, there is.

Q. Is there advertising run on cable television? A. Yes, there is.

MR. SAYRE: Your Honor, we would offer as Plaintiffs' Exhibit Ten as one example of a print media that is similar to the programming offered on cable television services the January, 1988 issue of the Readers Digest, simply for exemplary purposes.

MR. MORPHEW: Your Honor, I am going to object to its introduction for that purpose. I don't think any foundation—I have recalled two questions. Number one, is there advertising in this?, and number two, is there something in there that was reprinted elsewhere? I don't think that sufficiently establishes any similarity between this publication and cable television.

THE COURT: I guess that is up to me to determine, isn't it? That's what we are here about. It will go in over your objection.

* * *

[971] BY MR. SAYRE:

Q. Mr. Blount, in your tenure as Executive Director of the Arkansas Cable Television Association, have you become familiar with the television broadcast industry in Arkansas also? A. Yes.

Q. Is there a relationship or a competition, or at least a relationship between cable t.v. and broadcast t.v.?

A. A very close symbiotic relationship between the two.

Q. Would you explain to the Court what you mean by symbiotic?

A. Well, they help one another. As an example, all of the broadcast television stations in Little Rock, Channel 4, 7, 11 and 16, have had contact with me on many occasions in an effort to ascertain which cable systems carry their programming in which parts of the state. It is very important to them because obviously someone who lives in Rogers, Arkansas, is not going to be able to pick up with rabbit ears Channel 11 out of Little Rock, and the only way it appears there is because a cable operator has gone to the expense and effort to do the additional antenna work, and in many cases build a microwave system to bring that television channel into that part of the state. So in that sense, it helps the broadcast stations in the sense that it gives the cable operator another desired program to run on his cable system that assists him. So that's the relationship.

[972] THE COURT: Do those cable operators pay a fee to the local stations?

A. No, sir, they don't pay fees for a broadcast off the air programming.

Q. These are sometimes within the area, and I think Mr. Tucker testified about this, the must carry application of the cable communications policy owners.

A. Well, it's an FCC regulation.

Q. An FCC regulation? Is Channel 16 in Little Rock considered a satellite broadcast station or a super station that's broadcast off satellites?

A. They would like to be, but they are not at this time.

Q. Are they carried beyond the broadcast range in the central Arkansas area by other cable companies in Arkansas?

A. Yes, they are.

Q. I hand you what's been marked as Plaintiffs' Exhibit Eleven and ask if you can identify that please, sir?

A. This is a list of Arkansas communities served by cable television, which I compiled for the Arkansas Cable Television Association, based on data the cable system provided me. This lists the—it's an alphabetical listing of the community, every community in Arkansas that we could identify that has cable television, the ownership of that system, and all of the programming they provide with channel assignment for each of the programs.

Q. Did you conduct this survey personally?

[973] A. Yes, sir.

Q. Did you compile these results? A. Yes, sir.

Q. And also the computer printout, which is Plaintiffs' Exhibit Eleven? A. Yes, sir.

• • •

CROSS EXAMINATION

[974]

BY MR. MORPHEW:

Q. Mr. Blount, you mentioned several programs which were characterized by Mr. Sayre as news programs. One of those was the Lifetime channel. I think your comment was that it dealt strictly with health and related matters?

A. That's their principal focus.

Q. It's not their only focus though, is it? Isn't it true that that station in particular shows a lot of movies, particularly old movies?

A. It shows one movie a day, I believe, sometimes two, and they deal with women and women's problems.

Q. You don't know that that's all they show, do you?

A. I'd have to go get their program log for a year.

Q. But they are not strictly any kind of informative or news type of station?

A. That's primarily their sales pitch.

Q. The SIN Network, the foreign language broadcast, that is not a—strictly a news program either, is it?

A. No. I don't think we characterized it as news. I think we characterized it as strictly foreign language information.

Q. Which carries—

A. (Interposing) It has Spanish news on it.

THE COURT: It has everything on it. I've seen it.

A. Boxing, movies.

[975] THE COURT: Bull fights.

Q. Mr. Blount, you are not—you would not take the position that cable television is somehow in direct competition with the Readers Digest or some other publication?

A. No, it's analogous to it.

Q. But again, you wouldn't take the position that they—that cable television competes with Readers Digest dollars for entertainment purposes? A. No.

* * *

BY MS. DEMAILLY:

Q. Mr. Blount, t.v. and all this cable network and so forth I find very confusing, and I'm sure I'm not the only one. Are you saying that you provide the same type of service that the local t.v. stations do as far as providing news and so forth?

[976] A. Vastly expanded.

Q. Vastly expanded?

A. Yes, because of the much, much greater variety and the opportunity provided to be much more specialized.

Q. But—and since you're saying that you're analogous though, a much—in your terms—much more expanded to the

local t.v. stations, you pay sales tax, or your customers pay sales tax for the receipt of this information in their homes, is that correct?

A. They pay sales tax because it's delivered by cable to their home.

Q. So it's the delivery system? Is that—is that the difference?

A. That's what's being taxed.

Q. So if it's the delivery system, we have no way of determining who turns their t.v. set on and who does not on a non-cable basis, is that correct?

A. That's correct.

Q. But we do know who contracts to purchase the ability to gain, whether it's entertainment or any other piece of programming offered by your organization, is that correct?

A. Just as I suppose you would be able to do if you could get a subscriber list of everybody in Arkansas who subscribes to Readers Digest, or to Life Magazine, or Time, or Newsweek.

Q. So it's the matter of the delivery system?

A. That's right.

Q. And whether or not the sales tax is capable of being identified to a specific purchaser?

[977] A. What you're—actually what this does, it taxes the specific service. It's a service tax to tax gross receipts tax on the service.

Q. On the service? But without renting your equipment, your box, they can't get it, is that correct?

A. That's correct.

Q. So once again, you have the ability to determine—and it's—

A. (Interposing) Let me correct that just a little bit.

Q. Okay.

A. You said without renting our service or our box, they can't get it. Yes, they can. They can go out and buy a satellite dish and contract with someone else to get that same service and not pay sales tax on it.

Q. But they pay sales tax on the purchase of the satellite dish, is that correct?

A. Perhaps.

Q. Perhaps. And do you know whether or not for sure they pay sales tax on whatever additional mechanical apparatus or service that they gain to de-scramble?

A. I assume. I have not purchased one. But I assume if one purchases a decoder, you'll pay sales tax on it. I'm not sure what the arrangements are when one leases the equipment.

Q. But we do have, in this particular case with your t.v. cable association, your member associates have the ability to determine what services, what programs a person is buying. There's basic cable there's premium channels, and the pricing for each of those is [978] different. You buy—oh give me basic cable and give me Movie Channel and Cinemax. All right, your bill is X-number of dollars a month. If you want to add another premium, it's an additional amount.

A. That's generally the way it works.

Q. And that's directly correlated—or correlates to the sales tax for the service of seeing those channels?

A. The gross receipts tax is applied to the delivery of those channels, yes.

* * *

BY MR. MORPHEW:

Q. Mr. Blount, these other programs that you mentioned of a news or information type, C-SPAN, Headline News, CNN News and the Lifetime, many of the programs carried on those are rebroadcasts of an earlier taped program, is that correct?

A. Some of them are. I'd be hesitant to say many because so much of C-SPAN is live. Almost all of CNN is live in the sense that you have a live news commentator sitting there.

THE COURT: C-SPAN is only live part of the day, though, are they not, and then they will rerun the Senate and the House late at night?

Q. Programs run on some of these other channels like Lifetime have been—

[979] A. (Interposing) Most of that is prerecorded and run at a given time, yes.

Q. Rebroadcast?

REDIRECT EXAMINATION

BY MR. SAYRE:

Q. Mr. Blount, when you purchase a t.v. set, you pay sales tax on it.

A. That's correct.

Q. On the carrying of the broadcast station, the local broadcast station, both here in Little Rock, Fayetteville, Jonesboro. I believe those are the only broadcast stations in Arkansas. Perhaps there's one in El Dorado.

THE COURT: El Dorado has one.

Q. El Dorado has one. Do the local cable companies in those areas also carry the broadcast stations on their cable systems? A. Yes.

Q. So there's local news presented in the same way that national news is presented? A. Yes.

Q. In effect, there's a duplication of the same programming on cable that there is in broadcast. It simply depends on the method of delivery?

A. That's correct.

Q. As part of the delivery through cable—that's part of the [979-A] programming costs that are taxed. The local broadcast stations are recarried on cable television as part of the programming, and the entire programming package is taxed. A. Yes, yes, sir.

* * *

PAUL GARDNER, a witness called in behalf of the Plaintiffs was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Paul, would you state your name and address for the record please, sir?

A. My name is Paul Gardner. I live on Highway 81 North, Monticello, Arkansas.

Q. You're the same Paul Gardner that testified in this proceeding on August 19th? A. Yes, I am.

Q. At that time, you were President of the Arkansas Cable Television Association, is that correct? A. Yes.

Q. Have you had cause to lose that position?

A. I was re-elected in New Orleans last month.

[979-B] Q. So you're still serving in that capacity? A. Yes, sir.

Q. Would you state for the record please how many cable systems does Community Communications Company own?

A. We operate six cable systems.

Q. Would you state the communities that you operate in please?

A. Monticello, Warren, Eudora, Arkansas City, Tiller and Reed, which is one system, and East Camden.

Q. What is your largest system, and what is your smallest system?

A. Monticello is the largest system, and the system at Tiller-Reed is the smallest.

Q. Approximately how many people are served in each of those communities?

A. We have a little over three thousand subscribers in Monticello. which would translate to roughly nine hundred customers people. And in Tiller, we have about one hundred twenty homes, which on the average would be around three hundred fifty people.

Q. Paul, how do you receive the programming signals that you transmit by cable to your customers or subscribers?

A. We receive it off of satellite and off air.

Q. I hand you what's been marked as Plaintiffs' Exhibit Nine reflecting the satellites—the number of satellites and the broadcasts that are available. Is that generally descriptive of the type of programming that is available to you as a cable system operator? A. Yes, it is.

[979-C] Q. Would you describe for the Court the systems or the types of programming that you carry on your six systems, and by that, I mean, are they identical, are they different, and if they're different, why are they different?

A. Well, in Monticello, we carry a total of thirty channels, being our largest system. The people are a little bit more varied there. We have several factories. We have a branch to the University of Arkansas. We have some agriculture there. So, therefore, we look at different types of programming. News programming, cultural-type programming, programming on the Lifetime network, which has medical programming, is real interesting. In Eudora, for instance, we run about twenty-two channels. We don't have near the variety of programming there, because of—we have more agriculture in the area. So, we try to pick the programming that would be more interesting to the people. Eudora is largely black population. Therefore, we have on

down there black entertainment television, which is oriented to the black American.

Q. As the owner of these systems, who makes the final determination of what programming goes on each system?

A. I make the programming choices for our systems.

Q. Each system does not carry identically the same programming?

A. No, sir, they do not.

Q. Do you, from time to time, change the programming on these systems?

A. Yes, sir, we do make changes from time to time.

Q. Would you explain what factors go into your consideration of changing these programs?

A. Well, it can be change in the particular channel's programming. Costs. They can raise their rates where it might be prohibitive for us to carry it in a particular tier, or even carry it at all any more. But the programming is one of the big factors that we go by.

Q. Have you changed programming or, as you said, the tier of programming in your systems that has met with controversy or an attempt by the franchising city to change that decision by yourself?

A. Well, any change you make, you meet with some controversy regardless of what the programming is. Probably the biggest controversy we had was about three or four years ago when we moved ESPN out of our basic tier of services into a higher priced tier, and we did receive quite a bit of problems with the city fathers and the mayor.

Q. In what city?

A. In Monticello.

Q. Was pressure brought upon you to make a change, put it back into the basic?

A. Yes, sir, we were offered rate increases. We were also threatened with some other—losing a franchise and so forth. But, we did have the authority to do what we did, and we stuck with it.

Q. You were present in the courtroom on August 19, 1987, when Mr. Tucker testified about his system, County Cable, here in Pulaski County, offering both cable service and satellite delivery through decoders. You've heard that testimony?

A. Yes.

Q. Do you offer in your six systems a similar dual system of delivery?

[797-D] A. Yes, sir. We have—in three of our systems, we have what we call an addressable system. We use converters in all six of our systems.

Q. Would you describe for the Court what types—what differences, if any, would be the programming under your satellite delivery, which is your cable delivery? Of the programming? In other words, the types of programs that are delivered on your cable system versus the types of programs that are delivered from the satellite on the decoder. Is there any substantial difference in that programming?

A. No, sir.

Q. The scrambled items—scrambled channels do not simply cover what have become known as the premium channels, do they?

A. No, sir, most all cable channels are scrambled today.

Q. This would include the super-station, such as WOR, WGN?

A. All super-stations are scrambled today. From time to time, they will descramble them with technical problems and so forth, but all super-stations are scrambled.

* * *

Q. What about the Cable News Network, Headline News, Weather Channel, these types of programs?

A. The Weather Channel is not scrambled at this time. Cable News Network, C-SPAN is not scrambled at this time. Cable News Network—both Cable News and Headline News are scrambled.

[979-F] Q. When you deliver—do you use Cable News Network as part of your basic program?

A. It's basic in all of my systems, yes.

Q. Are there subscribers in your systems who receive these types of programmings through a decoder directly from satellite broadcasts?

A. Yes, in Monticello, Tiller, and in Eudora, we do some direct C-Band to home satellite dish owners. Eudora is the system that we have the biggest majority. Probably fifteen or twenty customers in Eudora have satellite dishes and buy through us.

Q. Do you—when you say buy through you, would you describe for the Court how you collect for the charges—collect for the services delivered by satellite versus on your cable in Eudora?

A. Okay, we have—the biggest—what most people want is the premium channels, HBO, Showtime and so forth. We do have some subscribers to ESPN, Cable News Network and some of those items. We charge the same rate in our systems if they are getting HBO in Eudora on a cable system or if theya re getting HBO on a satellite, they pay our same Eight Dollar fee.

Q. Would it be the same with regard to ESPN or—

A. (Interposing) We have a basic package for—what we call our basic satellite services.

Q. Those monies are paid to your company as opposed to being paid directly to some satellite company in another state?

A. Right, they have—the homeowner has the option of buying from us or from one of the services, HBO or whatever. When we collect it, then [979-G] we withhold our part, and—or we actually just pay them a rate that they have set for us.

Q. So, you—excuse me. Do you sell decoders?

A. Yes, I do sell decoders.

Q. When you sell decoders, do you charge the state sales tax on the decoder?

A. Yes, I do.

Q. And the local sales tax, if applicable?

A. Right, I do.

Q. Thereafter, on the monthly service charge for the satellite delivery, do you charge the sales tax?

A. We do not charge the sales tax on the program delivery.

Q. On your cable delivery, do you—in the same communities, do you charge sales tax?

A. Yes, we charge. They could be getting HBO in Eudora off a satellite, and they would actually be paying a lessor rate than they would off the cable system because of the tax.

Q. Do you have access channels in each of your communities?

A. We have channels that are set. They're not designated, but they are set aside in the franchise that they are available.

Q. Are there instances that you can tell the Court where your access channels have been utilized for original programming or coverage of local news events?

A. Yes, in a system in Warren, we have a channel that is used. They do taped delayed broadcasts of the city council meetings, football [979-H] games, the Pink Tomato Festival, and in Monticello, up until about a month ago, we were running the Arkansas Works program that was made here in Little Rock and sent out to various cable systems throughout the state.

CROSS EXAMINATION

BY MR. MORPHEW:

Q. Mr. Gardner, you indicated, I think, that you operate six cable systems all in Southeast Arkansas, and that of those six systems, only Monticello has the varied program that you spoke—the varied programs that you spoke of?

A. No, sir, we have—we carry thirty channels in Monticello and Warren. In Eudora we carry twenty-four channels. Our average at all of our systems is probably around twenty channels.

Q. Monticello and Warren, did you say, would have those additional news and information-type programs that you referred to?

A. We have the same programming in Monticello and Warren.

Q. But in the other areas that you serve, you don't carry those stations, I believe, because you said people have different interests?

A. Correct.

Q. Different type of people with different interests, whether it be because they are agricultural or because they're black or whatever?

A. Right.

Q. So in both of those, either in the Monticello-Warren areas or in [979-I] the other areas that you serve, what you carry for them is based upon what they want to see?

A. Their preferences play a big part in our programming, yes.

Q. You also indicated that because of the additional educational influence and other factors in the Monticello area, that was part of the reason that you felt those customers would want those additional services. Is that correct?

A. They express interest from time to time for a particular channel.

Q. You also indicated that it was that same Monticello area that caused the stir or the uproar when you decided to charge more or place ESPN in a different tier. Is that correct?

A. That's correct.

Q. ESPN is not a news or information-type program, is it?

A. It's—

Q. (Interposing) Sports?

A. A sports program.

THE COURT: Not necessarily, because they run a financial show every morning at Five O'Clock for about three hours.

MR. MORPHEW: I had forgot about that, Your Honor. I don't watch that part of it myself. So, I guess I'm not in that educated category.

A. They also have sports news on there.

Q. Excuse me?

A. They also have sports news on.

Q. This address-type system that you say you have, where you can act as a go between for a—I think you refer to it as a C-Band or—

A. (Interposing) Okay, the addressable system I referred to is not the same as the system for C-Band, no. The addressable system is in our cable system whereby we can—if you're renting one of my systems, and you wanted to subscribe to HBO rather than Showtime, we could turn one of them off and the other one on. That's the addressable system. The C-Band system is the home—well, actually C-Band is for any satellite reception, but the home dish owner, we do act as a go-between for those people when they want certain programming. They can come to our—call our office and get this program, or they can go direct to the programmer.

Q. The addressable system doesn't involve satellite dish at all?

A. No, sir.

Q. When you act as this go-between for a satellite or a C-Band company—I'm not sure how I should designate them—what—let me phrase this differently. How do you provide that service to your customer? The satellite—or not your customer, but the satellite dish owner who wants a particular service, how do you provide that service to them?

A. We contact the programmer, and they send a signal to the—through the satellite to the homeowner's decoder, descrambler.

Q. So, y'all don't hook up any wire or cable for that?

A. We have—we do sell home dishes and—or we used to sell, before they became so unpopular, home dishes and decoders, but at this time, we're mostly acting as providing a programmer for the homeowner. All we do is make a few phone calls.

[980] Q. When you provide this program, acting as the go-between, you don't string any wire or cable? A. No.

Q. To that person's residence? You're simply the collecting agent?

A. We start sending them a bill after we get it turned on.

Q. You—for your cable customers, do you have a network of satellites that you receive signals on?

A. Yes, I do.

Q. You don't pay any tax on the services that you receive from any of the satellite companies?

A. On the programming that we receive?

Q. No, no, I understand that you pay for the programming. Do you pay the tax?

A. Tax on the programming is what you're asking? No, sir.

Q. As I recall your testimony, whenever you would change programming, either delete a program or add a program, you indicated, and I think you indicated earlier in answer to my question as well, that the fact that that would determine or influence those changes would be your costs, whatever it costs you to get the program, and the desires and wishes of your viewers. Is that correct?

A. That's a couple of big factors. They could change satellites. We may not have a satellite available that we could. So the cost would be too great to keep them on.

Q. The original programming—I don't think I could write fast enough to get—you said that you had original programming, I think, in two [981] areas?

A. Warren is the one where we do the most.

Q. Warren has the one you mentioned had the football games and the Pink Tomato Festival?

A. Would be football games, the Pink Tomato Festival. The thing that we do probably with the most regularity is Church programming and the city council meetings.

Q. I'll ask you a question I asked Mr. Blount. You don't—you don't consider your system or the cable systems that you have to be competing for dollars with something like a Readers Digest, do you?

A. In a broad sense, I guess we're all competing for the same dollar, but, no, I don't today feel like that we're competing with Readers Digest.

Q. I understand that, but certainly if everybody in your cable system area bought a Readers Digest, you don't think that has any impact on your sales?

A. I don't feel like it does, no.

Q. Or the type of programming that you would offer?

A. No.

* * *

REDIRECT EXAMINATION
[982]

BY MR. SAYRE:

Q. Do you attempt to balance the type of programming that's offered? By that, I mean entertainment, sports—

A. (Interposing) A wide variety, yes. That's the big objective that cable companies can have is the fact that we can be narrow-cast, and we can offer a whole lot of different programming, where your off-the-air channels are trying to offer the variety on one channel.

Q. That is a selling tool or something that makes your service—

A. (Interposing) Yes, when we set up a tier of services, we try to keep a little variety in that tier so we can sell as many people in that tier as possible.

Q. From time to time, the programming within that tier changes?

A. Yes, sir, we do change it from time to time.

Q. What are the changes based on?

A. Again, programming changes, monetary changes, and so forth can cause this too. We can all—we will also add channels particularly to our tiers from time to time and try to make them more—you know, where more people would get on them.

MR. SAYRE: I pass the witness, Your Honor.

THE COURT: What's your experience in terms of—and this is just my own edification. In a given market, what percentage of the people will take a cable system and subscribe to it in your area?

A. In my market, we run in Monticello probably eighty-five percent of the homes have cable.

[983] THE COURT: Availability, eighty-five?

A. We're available to everyone in Monticello, Arkansas. In Eudora, we probably run seventy percent. We don't have

any systems that we don't run at least sixty-five to seventy to eighty percent. Wherein—well, metropolitan areas, it would fall off greatly.

* * *

CROSS EXAMINATION

BY MS. DEMAILLY:

Q. When you sell one of these decoders, you said you collect the sales tax on it at the point of sale? A. Right.

Q. You have no way of controlling whether or not they come for HBO to you, or they go straight to HBO, is that correct?

A. I do not. I do not.

Q. So you have no way of keeping up with it unless you just happen to remember John Smith over here bought a decoder from me, and now I wonder where he's going to get his programming. On the other hand, if they subscribe to your cable system, then you know exactly, once again, who is getting what, is that right?

A: That's correct.

THE COURT: He knows who has leased his decoders, because they pay a monthly fee on them.

[984] MR. SAYRE: That's what—they purchase the decoders, but they lease the service, or they provide the service.

REDIRECT EXAMINATION

BY MR. SAYRE:

Q. And with regard to that, don't you also provide maintenance on the decoder?

A. We do for about six months on the decoders.

RECROSS EXAMINATION

BY MS. DEMAILLY:

Q. Is that like a warranty, or do they pay for that maintenance?

A. It's more like—I'm living in that town and have lived for the last thirty-nine years, and I know he will come back to me if I don't—

Q. (Interposing) I'm from a small town too. I understand that.

MR. SAYRE: Thank you.

* * *

DEAN DEYO, a witness called in behalf of the Plaintiff was examined and testified as [985] follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Mr. Deyo, would you state your name and address for the record please, sir?

A. My name is Dean Deyo. D-e-y-o is the last name. My address is 5450 Winchester Road in Memphis, Tennessee.

Q. What is your profession or employment please, sir?

A. I am the president of Memphis CATV.

THE COURT: That's not a bus company!

A. I hope not.

Q. Dean, may I admonish you, but the Court does not speak in acronyms, and we need to explain for him and for the record what the CATV—

A. (Interposing) I'm not sure that it really stands for anything. In the old days of cable, I believe it stood from Community Antennae Television.

THE COURT: That's correct.

A. It's simply the name of the company

Q. Does your company operate in any extent in the state of Arkansas?

A. Yes, we operate a total of nine franchises, and four of those franchises are in West Memphis, Sunset, Marianna and the Crittendon County, Arkansas.

Q. Could you give the approximate sizes of those systems by subscribers?

A. They are all technically fed off of one control center and serve [986] about eight thousand homes in those four communities. Well, three communities and unincorporated Crittendon County.

Q. Dean would you describe for the record please the—your educational background?

A. I have a degree from Northern Illinois University in broadcast journalism and television communications. I also am a graduate of the cable management courses from Denver University.

Q. Would you state for the record your work experience in the cable industry?

A. I've been in the cable industry for seventeen years. Spent two years as a producer and managing editor for a nightly news program on a cable television system in DeCalk, Illinois. Was the program manager for the first urban cable operation authorized by the FCC in Rockford, Illinois. Was five years there. Went from programming manager to doing public relations, advertising, assistant manager. Was general manager of Wisconsin CATV. In 1979, came to Memphis, Tennessee, as general manager to build the systems in Memphis and the Memphis suburbs and became president of the corporation, Memphis CATV, in 1984.

Q. Approximately how many subscribers does Memphis CATV serve?

A. We serve one hundred and forty thousand customers in the Memphis-metro area, three states, in Tennessee, Arkansas and Mississippi.

Q. Do you personally or have you personally been involved in the programming or choice of programming carried on your cable system?

A. Yes, also in conjunction with my staff but I have personal input in the programming.

[987] Q. Are the programs that are carried in Memphis proper the same that are carried in West Memphis, Sunset, Crittendon County?

A. No, we have different programming on our three different operations. We basically divide our operations into Tennessee, Mississippi, and Arkansas and there are different program choices in those three areas.

Q. Would you describe for the Court what objectives you try to meet in the choosing or the choice of programming that you offer, say, on the Arkansas system?

A. Well there's a number of different objectives that we are looking for. Some of them go to personal tastes, although I've been in the business for seventeen years and try to keep my personal taste out of that. I know that's a very difficult thing to do. We do sophisticated research with our customers to determine what their tastes are. We subscribe to Arbitron Service for ratings in order to determine what is being watched in those markets. Costs and business factors play into what's happening. And because of our geography, we try to make sure that we have the type—we try to defer to the statewide program. In Arkansas, we make sure that we have Arkansas news and entertainment programming on. And, I guess, finally we try to make sure that we have a balance of programming so that we are not skewed toward any one particular type or style of programming.

Q. How many channels are carried in your four Arkansas systems?

A. I believe they carry thirty channels currently.

Q. Are there public access channels in each one of these?

[988] A. Yes, again, technically, the four franchises all have the same channels, because they're served technically from the same control center, but we do have local channels that we program for that operation in Arkansas, yes.

Q. Is there any original programming carried on by Memphis CATV?

A. Yes.

Q. Would you describe for the record please what type of original programming is done and the amount of it?

A. Well, to define original programming, very specifically, we have produced original drama, plays, teleplays that have been written specifically and produced in our studios. Comedy programs that are, again, may feature local talent or national talent, but were written and produced specifically within our studios. Live programming, which, of course, is all original as it's produced. Sports programming, public affairs, documentary programming, any number of things.

Q. Are these carried on your West Memphis system and your Crittendon County, Marianna, and Sunset systems, as well as the Memphis system?

A. Some of them are, yes. It just depends on the particular programs. There are other programs that are produced specifically in West Memphis that are only carried on that system and not carried on the Memphis or Mississippi properties.

Q. Is there advertising carried on your cable television channels in Arkansas?

A. Yes, we have limited advertising on the Arkansas system, very extensive advertising on the Memphis systems, and we have a full [989] program of extensive advertising that we'll introduce in Arkansas next year, in 1989.

Q. Is this both of a local and a national nature?

A. Yes, we sell—we have national representatives under contract to us that sell national advertising specifically

for our systems in markets such as New York, Chicago, Detroit, Atlanta, Los Angeles. And we also have a local advertising sales force that sells local commercial sponsorships.

Q. Would you describe for the record please how these are broadcast or cable cast to your users?

A. Many of the channels that we offer on our system provide X-number of minutes per hour of availabilities for local advertising use. If a cable system does not use that advertising, there will be another national commercial that will be there or public service announcement that will be there so it's not a blank in case someone—in case a system does not sell local advertising, but we are notified where those placements are, both in advance with a cue-sheet and through electronic tones, and we then insert our local commercials over the top of the feed that's there.

Q. Would you give us a specific example of a programming or network that offers that type of—and how many minutes per hour would generally come out of that?

A. We currently sell local sponsorships on eight nationally delivered channels in addition to our local channels that we produce ourself. ESPN would be a prime example of one that allows—I believe ESPN has [990] two minutes of advertising per hour that's available to the local use.

Q. There's been prior testimony, Dean,—you were not here—that you hear three little beeps, and I've been noticing the three little beeps before on ESPN or the CNN, this type of network. What does that indicate is coming up?

A. Many of the cable systems technically use an automated system for providing the cable and the advertising inserts where they'll have a videotape machine with the commercial already on it, sitting there unattended, no human being. And the three beep tones that come down

from ESPN are actually tones that start that machine moving and insert that commercial then in place of it. ESPN actually triggers the commercial itself as it goes on. And the three tones are what switch away from ESPN to the local commercial, and at the end, there will be three more tones that will take it from the local commercial back to ESPN.

Q. Those commercials, the local station actually receives a payment for it?

A. Yes, that's correct.

Q. Do you receive part of the national advertising that's done on ESPN or the other stations?

A. No, we receive no split from the national commercials. We sell our own national advertisers. In other words, there will be—we have representatives in New York that will go to a large national advertiser, such as Chrysler, not the local Chrysler dealer, but the national advertiser Chrysler, and say, "We would like to sell you time on ESPN in [991] West Memphis, Arkansas." We receive all that money. But for the national Chrysler spot that airs nation wide on ESPN, we receive no—no portion of those funds.

Q. In your seventeen years in the cable business, have you also been involved with the print media in mass communications, in the sense of magazines and newspapers or people who work in one of the other systems with you?

A. Well, my early training, of course, was in journalism, and I have had personal experience in working, prior to joining the cable industry while I was going through college and worked for—have done several print publication-type things on a small basis. Recently, we had a good example where our operations manager in West Memphis, Arkansas, for the last couple of years, a gentleman by the name of John Wood. We hired John as our operations person from the local newspaper. He was a reporter for the local newspaper in

West Memphis. Became our operations person and did both local programming and other programming for us on the system there, as well as marketing and public relations. John recently left our operation in West Memphis and is currently—went to work as an editor for a newspaper in Memphis.

Q. Do you have any personal experience with regard to ownership or operation by the same entity of broadcast stations and cable stations?

A. There is a restriction, federal restriction, against broadcast ownership of cable television systems. However, early on, I went to work for a cable system that was just starting in Rockford, Illinois, and it was the first cable system that was certified by the F.C.C. in an [992] urban market. And at the time, the company I went to work for owned the CBS broadcast station in Rockford, Illinois. And because of this ownership restriction, was told that they had to sell one of the properties, either the cable system or the broadcast station, and ultimately, after a number of appeals, decided to sell the broadcast station.

Q. And retain the cable system?

A. Yes, that's correct.

Q. In your programming choices for cable television, are there any comparisons, in your opinion, between the cable broadcast and the dissemination of information in the print media in your locale?

A. Yes, I believe there is. Just generally on the surface, I can tell you for example that my company has a number of major companies which are stockholders in our operation. One of our largest stockholders is a company called Time, Incorporated, which, of course, is a major publishing company, nation wide across the United States, publishers of Time Magazine and Sports Illustrated and Life Magazine and

numerous other publications. I know that Time Magazine—or Time Incorporated is in my operation as a stockholder and the second largest cable operator in the United States. And I know that is because that there is a close synergy between their publishing companies and cable television. As a matter of fact, several years ago, Time sold off most of their companies that they owned that were not in that specific line of business. They owned forest product companies. They owned packaging companies and market research and decided they wanted to strictly be in companies that [993] disseminated information, entertainment, and are strictly today in the publishing and cable television business. I guess in addition to that, in my decision making process in trying to determine programming for the different franchises that we operate, I feel my job is very similar to some of the folks on the magazine side who I have had contact with.

Q. In your determination of programming, what types of programming are available? I think there are eighty or a hundred separate programs that could be carried. So if you have a thirty channel, you have to make some discretion or some decision on what you're going to carry.

A. Right.

Q. What factors go into that exercise of that discretion?

A. Well, right off the bat—off the top, there are legal factors. There are certain amounts of programs, different types of programming that we are allowed or can carry. There are only a certain number of—certain types of stations that we can carry. There are cost factors of what the costs of the programming would be. It is very important that we try to match programming to a specific community. We carry Razorback sports in our operation in West Memphis. We do not carry Razorback sports in Memphis, but we would be foolish not to carry Razorback sports in our operation in West Memphis. Again, there are a number of factors, from

business related factors to ratings and audience interest factors, that we have to take into consideration.

* * *

[994] Q. From your experience in the print media and your association with the print media, would an editorial decision or a decision on what to publish in the print media of a magazine be similar to the decisions that are made by you in the programming that are carried on cable television?

MR. MORPHEW: Your Honor, I renew the objection. That is just—whatever he might say and that would be primarily based on speculation and what he thinks and what somebody else might do, but it wouldn't be of his own knowledge.

THE COURT: Well, his own testimony earlier was he takes into consideration your preference and economics as one of the prime considerations. I'll let him answer the question.

A. I can answer that two ways. Yes, I think that the contact that I [995] have with other members of our corporation that are strictly on the print side of the business, I find that my job is very similar to the decisions that they have to make. In addition, I did work for two years as managing editor of a nightly news program, and many of the decisions that I made in putting together the nightly 6:00 and 10:00 newscast on the appropriate amounts of hard information versus soft entertainment versus sports versus weather are the same types of balances that I must make programming, not for the 6:00 and 10:00 news, but programming for long-term on my customers where I have an entire channel that I'm trying to program or thirty channels that I'm trying to program rather than thirty minutes at 6:00 at night.

* * *

Q. Is there a similar—let me ask you this. Is there a similarity between the type of information, entertainment, and advertising that is distributed by the Readers Digest, as an example of one publication, and [996] the type of information, entertainment and advertising that's disseminated on a mass communication basis by your cable television systems?

MR. MORPHEW: It seems to me that that's asking for a legal conclusion in a matter that the Court will have within its own power to answer.

THE COURT: Well, he can have his opinion. But, of course, that is one of the ultimate issues here.

MR. SAYRE: It is one of the ultimate issues, Your Honor, but I think that we are simply trying to draw factually the analogy between—

THE COURT: (Interposing) What you're asking is for his opinion. That's fine. He can have one.

BY MR. SAYRE:

Q. Do you have an opinion?

A. Yes, and I do see similarities. The Readers Digest contains information that they have purchased from other sources and reprint it as we purchase programming which is from other sources and rebroadcast it. Readers Digest has information that they produce themselves, write themselves, as we produce local information and entertainment programming ourselves on the cable system. They have national advertising that is in all their additions. Like most magazines, I'll make the assumption that they have regional editions where local advertising can go into the Readers Digest, just as local advertising is inserted on a cable system. So I see a number of similarities between [997] that. And, in addition, with my own stockholder, Time, Incorporated, I

know their philosophy on providing magazines is very similar to cable television. They want to provide Time Magazine for hard-core weekly news buffs. They want People Magazine for entertainment and the light side of the news. They want Sports Illustrated for those people that want sports information. They want Southern Living for those folks that want cooking or home entertainment information. Very similar to the different channels that we would broadcast on the cable system.

Q. That's what I was going to ask you. Can you draw an analogy to specific programming or channels that are carried then by cable television to those specific examples?

A. Yes, we do the same thing because unlike a broadcast television station that has only one channel and twenty-four hours a day and has to figure out how to segment that channel to be sure that they have a little bit of weather, and a little bit of news, and a little bit of local programming, and a little bit of sports, and a little bit of game shows, cable television, with our multiple channels, have the ability to carry channels, total channels, twenty-four hours a day of this same information. it is very similar.

Q. What would you broadcast that is similar to Sports Illustrated?

A. Sports Illustrated and ESPN, of course, are very similar.

Q. What about Time?

A. Time Magazine and Cable News Network, very similar. People Magazine and, not necessarily entire channels, but the light entertainment that we have on a number of our channels. As a matter of [998] fact, our company has recently entered a program where we are selling common advertising between our magazines and the cable television systems. In other words, they'll go to Time

Magazine advertising sales people will be repping the Toyota people nationally and say, "We want you to take out a full page ad in Time Magazine, and at the same time we will give you X-number of thirty second commercial spots on the cable system in Memphis, Tennessee, or West Memphis, Arkansas. So we have combined the resources of the two in order to reach a large number of people.

* * *

CROSS EXAMINATION

BY MR. MORPHEW:

Q. Mr. Deyo, when you indicated the factors that go into determining which programs you will carry on your cable, on a particular cable system, after mentioning that you tried to keep your personal taste out of the decision because you didn't think that was relevant, you mentioned, first of all—excuse me, you mentioned then customer surveys and Arbitron ratings, which—both of which would indicate what viewers wanted to see.

A. Yes, that's correct. Arbitron would indicate what viewers are watching, not what they want to see.

Q. What they are watching. Then you indicated the cost to your [999] company of, I guess, purchasing the programs or getting the programs out to the people? And then you mentioned also that you would try to get for the Arkansas system programs that Arkansas people would want to watch, such as, I think you said, Razorback football and some others. And also you tried to achieve a balance. When you say you try to achieve a balance, isn't that just another way of saying that you're trying to get something that a whole lot of people will like? Or a bigger cross section of people will like?

A. There's probably other reasons why you would create a balance too. You don't want to—you want to—as was mentioned earlier, with the number of channels that are available to be carried, and with only thirty channels of programming to be programmed, you want to make sure that the balance that you're going after, yes, number one is what the customers will accept, but also what the company feels good about. In our West Memphis operation, we carry three PBS stations, and we feel that is a heavy slant toward PBS and are currently in the process of eliminating one of them in order to get a better balance in our program mix.

Q. Let me ask you this. If according to one of your surveys or according to your view of the Arbitron ratings it was determined that two or three people, or no one wanted to watch PBS in your area, would you carry it?

A. Yes, we would. We would at least carry one PBS in the area. That's part of our balance.

Q. As opposed to carrying a program that would otherwise be available [1000] to provide that people did want to see?

A. Yes, we on regular basis do not listen to the surveys that we get and impose our own. Sometimes we feel we're smarter than what the information comes back on the survey. So yes, we do not always—

Q. (Interposing) Smarter than your viewers?

A. Yes, that's correct. We do not always take the information that's there. The number one channel that comes back requested on the survey, we do not currently carry at this time.

THE COURT: Well, a good example of that, and it would not necessarily be on cable, would be Hill Street Blues. They kept trying to take it off, and people kept screaming. The

machines kept saying nobody is watching it, but every time they tried to cut it, they'd get a rift of pressure to keep it on. They went four or five more years.

A. The majority of my subscribers are very heavily into three areas, movies, sports and information-type programming, but at this point in time, only fifty percent of the people that I have a cable going by subscribe to my programming. So, something is not encouraging those other fifty percent to subscribe. A better balance of programming, regardless of what the current surveys say, might be in a bit of interest to the company. We have carried programming before that customers have objected to. We've carried programming before that customers have strenuously held rallies. We have one group picket our Memphis operation every Saturday for a year. We have had requests from the city of West Memphis to carry programming that we do not currently carry at [1001] the moment. There are a number of things that go into that program decision. Customer reaction and taste is one of those opinions.

Q. The primary consideration?

A. In some cases, perhaps, but, no, I mean my experience has been not necessarily the primary.

Q. You're in the business to make money, right?

A. That's right, we are a business.

Q. You make money by selling cable t.v. to customers?

A. Yes, that's correct. But, again, just because a customer wants a certain program does not mean it's in the best interest of the company to carry that program.

Q. I think you—you can re-educate me if you need to, but I think you said your personal experience with respect to the print media was confined to some part-time work in college?

A. Yes, that's correct.

Q. You made the statement that you knew what Time magazine wanted to do in its particular publications. So you don't have any personal knowledge of that, do you? I mean, you haven't had—has Time magazine, for instance, consulted with you or shared with you its decision making process in what they publish?

A. Yes, I'm a senior executive, and although I'm not on the board of directors of Time, Incorporated, I'm a senior manager of Time, Inc., yes.

Q. Okay, and you know, from your own personal knowledge, what they try to do with their particular publications?

[1002] A. I am informed of the philosophy of Time, Incorporated on their publications, yes.

Q. You thought or you indicated that you thought there were similarities between publications and what you do, as in cable television?

A. Yes, sir.

Q. It's also true, is it not, that there are many similarities between what you do and what broadcast television does? I know you pointed out the dissimilarities. For instance, cable television rebroadcasts or retransmits much of the same type of entertainment programming that broadcast television does, does it not?

A. There are many similarities between cable television and broadcast television, yes, sir.

Q. Going back to this stock—Time, Incorporated being one of your stockholders. You said there was some close—I

think the term you used was synergy—between publications and cable t.v. What did you mean by close synergy?

A. Time, Incorporated considers the cable business to be very closely related to publishing a magazine.

Q. You also indicated that Time magazine or Time, Incorporated was into other ventures before it decided to limit itself to two areas. And as someone with knowledge of Time, Incorporated, I suppose I can ask you then it is also a major concern of Time, Incorporated in what ventures it gets into? The major concern is what is most profitable to it?

A. As a publicly owned company, Time would be very concerned about [1003] profitability, yes, sir.

Q. So if cable t.v. was a profitable enterprise for it to get into, it wouldn't necessarily require any closeness in philosophy?

A. It wouldn't necessarily require that. Although, Times' philosophy is that it have a close synergy.

* * *

REDIRECT EXAMINATION

BY MR. SAYRE:

Q. Gene, one question with regard to the programming. No matter what type, who has the final determination of what programming is chosen to go on the cable systems?

A. The final determination is mine.

Q. So, it's left to the cable operator?

A. That is correct.

* * *

TESTIMONY IN BEHALF OF THE DEFENDANTS:

MR. MORPHEW: Gail Price, Your Honor.

[1004] *GAIL PRICE*, a witness called in behalf of the Defendants was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MORPHEW:

Q. Gail, you testified at the hearing on the Motion For Preliminary Injunction in this matter?

A. Yes, I did.

Q. You are the manager of Arkansas—the sales and use tax section within the Arkansas Department of Finance and Administration?

A. That's correct.

* * *

Q. You are familiar in your capacity as the manager of sales and use tax section with what property and services upon which tax is collected and remitted to the State of Arkansas?

A. Yes, I hope so.

Q. You are in charge of administering the office which receives and processes those collections and reports, is that correct?

A. Yes, that's correct.

Q. Of the property upon which tax is collected and paid to the State of Arkansas, does that include the sale of books?

A. Yes, basically.

Q. Does that include the sell of magazines, publications that are sold [1005] over the counter?

A. Yes.

Q. Does that include the sell of video cassette recorders? A. Yes.

Q. Video cassette tapes? A. Yes.

Q. And those tapes include any tapes, whether it be for a movie or a documentary or an information program or whatever?

A. Yes, that's correct.

Q. Does that property upon which the Arkansas sales tax is collected and reported and remitted to the State of Arkansas include the equipment and materials purchased by a satellite dish owners? A. Yes.

Q. Does that include the equipment and materials purchased by those who would watch wireless radio or television, broadcast television? A. Yes.

Q. The taxes which your office administers—the sales tax, the general sales tax in the State of Arkansas—how long have you been in your office? A. Fifteen years.

Q. Fifteen years? And how long have you worked for the Department of Finance and Administration? A. Twenty years.

Q. You are familiar through all of your work and through your contacts and meetings and consults with everyone in the revenue [1006] administration. You are familiar with how long Arkansas has had a sales tax? A. Yes.

Q. How long is that?

A. Well, they—I think the temporary one first passed in '35, and tnen '41 was when the permanent law we're working under right now for sales tax is concerned. The complimentary use tax in '49.

Q. Over the years since the enactments of that sales tax act, many services have been subject to the sales tax, the general sales tax in Arkansas, is that correct? A. Yes.

Q. Those services include the service of providing natural and artificial gas to utility customers? A. Correct.

Q. Include the provision providing of electricity service to utility customers? A. Yes.

THE COURT: Telephones.

MR. MORPHEW: I guess I could just go through a list, Your Honor.

Q. Telephone, water, ice, steam?

A. Yes, that's correct.

Q. As a matter of fact, any other utilities of public service would be subject to the tax, is that correct, as a matter of the statute, except for—except for, I think the exceptions are transportation services, [1007] sewer services, and sanitation? A. Yes.

* * *

BY MR. MORPHEW:The service of furnishing hotel rooms is taxable in this state, is it not?

A. Yes, sir. Yes, it is.

Q. Now, and for a long time, the service of altering, refinishing, repairing numerous items of property has been subject to our sales tax, is that correct?

A. Yes, that particular law, I think 214, went in in '71.

THE COURT: Most fouled up set of statutes that ever passed.

Q. That includes the repair of motor vehicles, aircraft, farm machinery, motors, tires, batteries, rugs, upholstery, boats, radios, jewelry, watches, all of those things?

A. That is correct.

* * *

[1008] BY MR. MORPHEW:

Q. Is the service of printing subject to our sales tax? A. Yes, it is.

Q. The service of photography? A. Yes.

Q. Do—is the tax collected and reported and remitted on the sales of tickets or passes to places of amusement, recreation, or entertainment? A. Yes.

Q. Those include tickets to theatres? A. Yes.

Q. They include tickets to movies? A. Yes.

Q. To athletic events? A. Yes.

Q. And to any recreational or entertainment activity? A. Yes, basically.

Q. Is the tax collected, remitted or reported on the service provided by broadcast television stations, Channels 4, 7 and 11?

A. No, there's no tax on those—there's nothing to base a charge on I would assume in that case.

THE COURT: What was the question again?

Q. Whether the gross receipts or sales tax is collected and reported with respect to any service provided by a broadcast television station?

THE COURT: Television advertising, is it taxed? A. No.

[1009] BY MR. MORPHEW:

Q. No advertising is taxed, is it? Is the advertising charged by cable television taxed?

A. Probably not, no.

Q. But the service or providing television reception by the broadcast station is—no tax is collected on that?

A. There's nothing to base your tax on in this case.

Q. It's your understanding that the gross receipts tax is based upon just that, the gross receipts or gross proceeds received from a sale?

A. Yes, that's pretty clear.

Q. And is your understanding that there is no sale in such an instance that I just mentioned?

A. That's correct.

Q. Were you a part of and did you participate in any meetings concerning taxation of cable television services in your tenure as sales tax manager?

A. Yes, back about eight or ten years ago, we considered taxing it. We thought we had authority under the law at that time. Memos were written and discussions held, and, of course, it never did get off the ground, but it was discussed at several points.

Q. It was considered—or it was considered in that framework to be a taxable service already within the law as it existed?

A. Yes, that was the discussion.

Q. Are you aware of the decision making that went into specifically amending the sales tax law to add cable television as a taxable service, [1010] and why that was done? Why it was done in that fashion?

A. Well, it was just considered another service. I wasn't in on the final decision making, but it was discussed, and we just felt like it was another service that was taxable, and, therefore, they decided to—they didn't want to end up somewhere like this, so they waited and had the Legislature change it, you know, making it designated as a service.

Q. So that it would be clear that it would be included within the statute? A. Clear, yes.

Q. In your participation in those meetings and discussions with other personnel, was there ever any indication or statement made that cable t.v. was going to be singled out for special tax treatment?

A. No, it was just another service that they were trying to, you know, make taxable.

* * *

CROSS EXAMINATION

BY MR. SAYRE:

Q. Gayle, the statutory scheme for taxing the gross receipts or sales tax and compensating use tax provides that all tangible personal property is subject to the tax with certain exemptions. Is that correct? In other words, the statute says the sale of all tangible personal property shall be subject to the tax?

A. Yes, it just states, you know, just definitely tangible personal [1011] property.

Q. So the sale of any tangible personal property, whether it be a t.v. set, a decoder, an automobile, an above ground swimming pool, whatever it is, is covered unless it is specifically exempt?

A. That's correct.

Q. But the same does not apply to services under the Arkansas statutory scheme, does it?

A. No, they have to be specifically designated as taxable services.

Q. And only those services that are specifically enumerated in what's now Arkansas Code Section 26-52-301, I believe it's 3, and there's an A, B, C and D. Those are the four types of services that are covered?

A. I will have to take your word—

Q. (Interposing) Certainly, if you'd like to take a look at the—

MR. MORPHEW: (Interposing) I think Your Honor can see how the statute is set out. I think more than four types of services set out.

A. Yes, it runs from 26-52-301 all the way through that, yes, through D.

Q. Through D. It's A through D are these types of services? A. Yes.

Q. We went through a number of utility services, like electric, gas, telephone, water, ice and steam. To your knowledge, none of those have first—or claimed First Amendment right protection, do they?

A. There haven't been any lawsuits filed.

Q. You haven't seen those?

* * *

[1012] Q. The satellite broadcasts that we had described in the first hearing and also described today by Mr. Gardner, that he acts as the agent in providing that service and collecting the money. That is not subjected to tax under one of these criteria of A through D of Subsection C of the statute, is it?

A. So far, I haven't found a way to get it under there, but—(pause)

Q. But you're still looking?

A. We may make it.

Q. That's similar to your looking eight to ten years ago at cable television and finally determining it was not specifically a taxable service, is that correct?

A. Basically the same, yes.

Q. So, the satellite broadcasts through the local cable system, as a collecting agent, is not subject to tax in the State

of Arkansas at this time and has not been subject to tax by Act 188 of 1987?

A. You're talking about the similar to—

Q. (Interposing) To the cable delivery I'm talking about the satellite delivery that's collected for by the cable company.

[1013] A. No, that's correct, yes.

Q. So Mr. Gardner's testimony that he imposes the tax upon the delivery of those services by cable is a correct interpretation of the law as far as you are administering the law?

A. Yes.

Q. His not collecting the sales tax upon delivery of those services when he collects from the dish—the dish delivery, he is also correctly administering the law by not collecting the tax?

A. I think that would be a good assumption, yes.

Q. The radio and television broadcast services or their advertisement for the—to pay for those services are not subjected to tax in the State of Arkansas, are they?

A. No, there's no charge made on them, you know, so there would be no tax collected.

Q. There is no tax imposed—no sales tax imposed upon the sale of newspapers in the State of Arkansas, is there?

A. That's correct.

Q. There's a specific exemption from the sale of that type of tangible personal property.

A. That's correct, yes.

Q. There is also no tax, no sales tax imposed or no use tax imposed upon magazines of any nature that are sold by subscription, is that correct?

A. As long as it's by subscription, yes, they're not taxable.

Q. That is a change within the last two years, is that correct?

[1014] A. That's correct, yes.

Q. Part of that was dependent upon the action of the United States Supreme Court in the case of Arkansas Writers Project striking the tax on the Arkansas Times Magazine?

A. That's correct, yes.

MR. MORPHEW: I think we'd stipulate that that entire change was brought about by the decision of Arkansas Writers Project.

MR. SAYRE: I believe—

THE COURT: (Interposing) What was the tax imposed there?

MR. SAYRE: The sales tax.

THE COURT: On all sales?

MR. SAYRE: All sales of the magazine by subscription.

THE COURT: By subscription?

MR. SAYRE: Yes.

THE COURT: But it went off on equal protection, didn't it?

MR. SAYRE: No, First Amendment.

MR. MORPHEW: Your Honor, in the Arkansas Times case, the question—or the problem in that case was that the tax was collected with respect to certain publications based on their content, and certain others were not subject to tax based on their content. In other words, whether they were a trade, sports, or religious journal, so that the Court said that the distinction was on a content oriented basis and, therefore, could not be sustained.

MR. SAYRE: I believe those are issues I need to address in argument—in brief Your Honor, but it's the First Amendment.

[1015] BY MR. SAYRE:

Q. I would hand Mr. Price what's been marked as Plaintiffs' Exhibits Number Twelve and Thirteen and ask if he could identify those please, sir.

A. Number Twelve is a discriminative policy statement 188--1988-1.

Q. And Number Thirteen is the same revenue policy statement 1988-3?

A. 3, yes. The first one was—

Q. (Interposing) Excuse me, Mr. Price, would you describe for the record please, what is a revenue policy statement?

A. It's just as it says. It's just a statement issued by the Revenue Department. Department of Finance and Administration, and it's Revenue Division. Any time a

change takes place in the law where it requires a statement to be issued—

Q. (Interposing) As to how the law would be administered?

A. As to how the law would be administered.

Q. Would you then describe what Exhibit Number Twelve, revenue and policy statement 1988-1, what change was made in the law?

A. This is concerning the writers project, and all it says is basically as you go to the decision, subscription sales of publications are no longer subject to the Arkansas tax.

Q. I believe it says, "As a result of the Supreme Court decision, subscription sales of publications, regardless of the type or content of the publication, or the place printed or published, are no longer subject to Arkansas sales or use tax." Is that correct?

A. That's what it says, yes.

[1016] Q. Exhibit Thirteen is a further delineation of what is a sale by subscription? A. Yes.

Q. For purposes of implementing revenue policy statement 1988-1?

A. Yes, that's correct.

Q. They were issued on March 10, 1988, and March 30, 1988, respectively? A. Yes.

* * *

Q. Prior to that time, were you collecting—was the state collecting sales tax on magazines published in Arkansas, Mr. Price?

MR. MORPHEW: Your Honor, I guess if I was going to object to the relevancy of what's currently the state of affairs, I would certainly object to the relevancy of what went on prior to the laws that now exist.

[1017] MR. SAYRE: Your Honor, what I'm trying to determine for the records of this record, is that the time this suit was filed in May of 1987, there was—shortly after the Arkansas Writers Project decision was rendered. I'm trying to ascertain what the status of the law was then as its administration, and how it has evolved until the date of trial with regard to the sale of magazines which we claim are also First Amendment protective rights, and I think I have a First Amendment protective rights very similar to cable television services broadcasts.

THE COURT: I guess the real issue is what is the stated law today? There is on their books statutory law from the Legislature that says this service shall be taxed.

MR. SAYRE: Yes, but there are—there are interpretations—

THE COURT: (Interposing) Now, his policy or lack of policy has nothing to do with it. They're collecting it, I assume. They're here defending it, and you're here saying that it is unconstitutional.

MR. SAYRE: With regard to cable television. But with regard to the similar types of mass communications, there has been a substantial change made during the pendency of this action.

THE COURT: What has the substantial change been?

MR. SAYRE: The revenue—and perhaps I can make a statement and Mr. Morphew and Mr. Price can either agree or disagree. Mr. Morphew, probably would disagree, but that at the time the suit was filed. The Arkansas Times was a

magazine published in Arkansas that [1018] specifically had the tax stricken from it by that decision in the Arkansas Writers Project. In June of 1987, which is Plaintiffs' Exhibit Seven, there was an attempt to repeal the exemption that was found to be the problem or the core of the problem on the content based publication in the Arkansas Writers Project case during the first special session. That bill was defeated to remove the exemption. Subsequently, the Revenue Division, in its interpretive policy, has stricken the application of b-oth the gross receipts tax from magazines published in Arkansas and sold by subscription and the compensating use tax, which is the companion tax, from magazines that are published out of state and sold by subscription. At the times, Mr. Price testified before, I believe he indicated that magazines sold out of state—published out of state and sold by subscription into Arkansas were subject to the compensating use tax. There has been a change in the law as of March 10, 1988, or the administration law.

THE COURT: Is that correct?

A. Yes.

THE COURT: That is now the state of the law as y'all understand it?

MR. MORPHEW: The state of the law is now that if it's published and sold by subscription—if it's a publication, and it's sold by subscription, it's not subject to tax. We would point out though that, again going to the relevancy, it appears that the writers project case was decided before anything ever happened in [1019] this lawsuit.

MR. SAYRE: That is correct.

MR. MORPHEW: So, what the current state of the law is is what the law is and has been since the inception of this lawsuit.

THE COURT: You may proceed.

BY MR. SAYRE:

Q. So, the only tax imposed is the sales tax imposed upon magazines sold over the counter, whether they're published in this state or not?

MR. MORPHEW: Would you ask that again, Gene?

Q. The only type of magazine that is subjected to a tax on its sale in Arkansas now is the sale of magazines over the counter as opposed to by subscription?

A. Yes, the way I understand this decision, it didn't affect anything other than the subscription sales. Everything is still taxable.

* * *

[1024] BY MR. SAYRE:

Q. Mr. Price, the Snyder Corporation here provides ARN, a new service—agricultural service that is beamed by satellite from Little Rock to various stations around the state for a fee. Since that's delivered by satellite, is there any tax imposed upon that service by the revenue department?

A. There's no charge on which to base a tax on.

THE COURT: Are you talking about Lowell Rufcorn?

MR. SAYRE: Yes, sir, Lowell Rufcorn.

THE COURT: Isn't that a lovely name for a farm guy, Lowell Rufcorn?

BY MR. SAYRE:

Q. The service—there's a charge for that service to each individual station? Did you know that there are sports news carried on small radio stations across the state through this ARN Network, which for a service fee provides those radio broadcast services? There's no tax imposed by [1025] the Revenue Department upon those services provided by the Snyder Corporation, to your knowledge?

A. Not to my knowledge, no.

Q. And there wouldn't be under the law as it now exists and administered by you? A. No.

* * *

REDIRECT EXAMINATION

BY MR. MORPHEW:

* * *

Q. Gail, its also true that we don't—the cable television companies do not pay and we don't collect from them a tax on the satellite services they receive, is that correct?

A. That's correct.

Q. The satellite services that they receive from whatever satellite company they pay for free of tax, free of sales tax, is that correct?

A. That's correct, yes.

* * *

PLAINTIFF'S EXHIBIT 2
(8-18-87)
[825-826]

NATIONAL CABLE TELEVISION ASSOCIATION
ncta

SCRAMBLED CABLE SERVICES AVAILABLE

Service Phone Number	Cost
Cinemax 1-800-426-3474	$ 12.95/month; $116.55/year; $ 9.98/month when purchased with HBO; $ 7.48/month when purchased with HBO at yearly subscription rate
CNN & CNN Headline News 1-800-843-9266	$ 25.00/year
ESPN 1-800-422-9000	$ 24.96/year
HBO 1-800-426-3474	$ 12.95/month; $116.55/year; $ 9.98/month when purchased with Cinemax; $ 7.48/month when purchased with Cinemax at yearly subscription rate
Showtime 1-800-422-9000	$ 10.95/month; $120.00/year; $ 8.48/month when purchased with TMC; $ 7.75/month when purchased with TMC at yearly subscription rate

The Movie Channel 1-800-422-9000	$ 10.95/month; $120.00/year; $ 8.48/month when purchased with Showtime; $ 7.75/month when purchased with Showtime at yearly subscription rate
Discount Satellite Programming CNN, Headline News, CBN 1-800-843-9266	1 year free with the purchase of an integrated receiver/ decoder from Echosphere or Houston Tracker. $31.95/year for subsequent years or without IRD purchase
HBO Package HBO/Cinemax/ CNN/Headline News 1-800-426-3474	$ 12.95/month for HBO or Cinemax; $ 19.95/month both; $ 7.48/Month each premium service when purchased together at yearly subscription rate; $ 25.00/year for CNN and Headline News

National Cable Television Association •
1724 Massachusetts Avenue, N.W. •
Washington, D.C. 20036 • (202) 775-3550

Viacom Satellite Networks Showtime/The Movie Channel CNN Headline News, ESPN (Christian Broadcast Network, MTV, VH-1, Discovery Channel, Nickelodeon, Learning Ch. Lifetime, Nashville Netwk, and USA Network will be included in the basic pkg.	$ 10.95/month for Showtime or TMC; $120.00/year for Showtime or TMC; $ 16.95/month both premium services; $ 7.75/month each premium service when purchased together at yearly subscription rate; $ 10.95/Month basic service package; $120.00/year basic service package; $ 7.00/month for basic service package with subscription to Showtime or TMC; $ 16.00/Month for basic service

at these prices as the services are scrambled.) 1-800-422-9000

package *and* Showtime or TMC when purchased at yearly subscription rate

7/30/87

PLAINTIFF'S EXHIBIT 3
(8-18-87)
[827-830]

UNSCRAMBLED PROGRAMMING SERVICES

ABC Network
Alaska Satellite TV Project
Local & network programming
America's Market Place
TV shopping
America's Value Network
24-hour shopping
American Christian TV (ACTS)
Southern Baptist Convention
American Movie Classics
Classic American movies
Armed Forces Satellite Network
Network and independent programming for military
Arts & Entertainment
Black Entertainment TV
Boresight
TVRO industry news, Thursdays, 9 PM (E)
Bravo
Cultural service, movies
C-Span
Live and taped coverage of US House
C-Span II
Live and taped coverage of US Senate
Cable Value Network
TV shopping
Caravan of Values
1 am to 5 pm (E)

Caribbean Superstation
Variety
CBC (Atlantic/North)
Canadian Broadcast Company feed to Atlantic/Mountain Time
CBMT
Canadian Broadcast Company feed to Eastern Time
CBS Network (West
5 feeds
Christian Television Network
Religious programs
Consumer Discount Network 1 & 2
TV shopping
Country Music TV
Country music videos
The Discovery Channel
Family entertainment, education and specials
The Disney Channel (East/West)
Family entertainment
Eternal Word TV
Catholic programming
Financial News Network/Score
Financial/sports review
Fox TV Network
Galavision
Spanish programming
Health Information Network
1-3 pm (E) weekdays
Hispanic Broadcasting Network
News in Spanish, Monday-Friday, 6:30 pm (E)
Hit Video USA
'Round-the-clock video
Home Shopping Network 1
Shop-by-phone, 24 hours daily
Home Sports Entertainment (Houston)
Astros, Rockets
Home Team Sports
Baltimore, Washington, professional and amateur sports
House of Commons (English)
Parliamentary coverage

House of Commons (French)
Parliamentary coverage
International Television Network
Syndicated programming from Australia and Europe
JISO (Japanese)
Feed from US to Asia
KFMB, San Diego
CBS affiliate
The Learning Channel
Liberty Broadcsting Network
Religious programming
Lifetime
Health, crafts, cooking, exercise, interview
Lifeway TV Network
Shopping
Madison Square Garden (NY)
Professional and amateur sports, entertainment
The Meadows
Sulkie racing, Meadows Racetrack, PA
MuchMusic
Music videos
Music Television (MTV)
Rock Videoclips, concerts
The Nashville Network
Country entertainment, interview, sports
National Jewish TV
Jewish programming
National Shopping Club
TV shopping, 24 hours daily
NBC Network (East)
NCN
Religious programming
The New England Sports Channel
New England Sports Network
Nickelodeon (West/East)
Educational & entertaining children's programming, 24 hours daily
Nostalgia Channel
Old-time TV, films, news

People That Love (PTL)
Religion
Playboy Channel
Adult entertainment
Prime Ticket Sports
Southern California
Pro Am Sports Network
Michigan, Ohio, Indiana, Detroit Tigers
PBS (A)
Educational
PBS (B)
Educational
PBS (C)
Educational
PBS (D)
Educational
Rock Christian Network
Music videos, religious, 24 hours daily
The Satellite Show
TVRO news program, Tuesday 9 pm (E), Saturday 12 pm (E)
Shop-At-Home
TV shopping, 18 hours daily
The Silent Network
Programming for the deaf
Sky Merchant
TV shopping
Sports Channel
NY sports area
SportsVision (Chicago)
White Sox, Bulls
TelShop
TV shopping
Tempo Network
Variety
Three Angels Broadcasting
Religious
Travel Channel
Trinity Broadcasting Network
Religious

University Network
Religious, Dr. Gene Scott
Univision
USA Network (East/West)
Variety
Video Hits-1 (VH-1)
Music videoclips
The Weather Channel
'Round-the-clock weather
World Satellite Television Network
Syndicated programming
Worldwide Television Network
European news feeds 11:45 am (E) weekdays
XEW, Mexico City
XHDF, Mexico City
XHITM, Mexico City

PLAINTIFF'S EXHIBIT 7
(8-19-27)
[835-836]

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

DEFENDANT RAGLAND'S RESPONSE TO PLAINTIFFS' FIRST REQUESTS FOR ADMISSIONS
(Filed August 17, 1987)

Comes H. G. Price, Manager, sales and Use Tax Section of the Revenue Division for the State of Arkansas and for his Response to the First Requests for Admission states:

REQUEST FOR ADMISSION NO. 85: Attached hereto as Exhibit C is a true and correct copy of House Bill No. 1031 introduced on June 2, 1987,, by Representative Hays during the First Extraordinary Session of the 76th Arkansas General Assembly.

RESPONSE TO REQUEST FOR ADMISSION NO. 85: Admit.

* * *

REQUEST FOR ADMISSION NO. 87: House Bill No. 1031, attached hereto as Exhibit C, was considered and voted as "do-pass" recommendation by the Committee on Revenue and Taxation of the Arkansas House of Representatives on June 2, 1987.

RESPONSE TO REQUEST FOR ADMISSION NO. 87: *Admit.*

* * *

REQUEST FOR ADMISSION NO. 89: House Bill No. 1031, attached hereto as Exhibit C, was considered by the members of the House of Representatives of the Arkansas General Assembly on June 3, 1987, and House Bill No. 1031 was defeated by a formal vote of 20 "for" and 61 "against" on that date by the House of Representatives of the Arkansas General Assembly, First Extraordinary Session of the 76th General Assembly.

RESPONSE TO REQUEST FOR ADMISSION NO. 89: Admit.

* * *

VERIFICATION

State of Arkansas

County of Pulaski

The above and foregoing is true and correct to the best of my knowledge, information and belief.

/s/ H. G. Price
H. G. Price, Manager
Sales & Use Tax Section

State of Arkansas

County of Pulaski

Subscribed and sworn to before me this 17th day of August, of 1987.

/s/ Phyllis J. Grigsby
Notary Public

My Commission Expires:

3-18-90

The objections to the foregoing are proper under Arkansas Rules of Civil Procedure and made by me this ____ day of _____, 1987.

/s Wayne Zakrzewski
Wayne Zakrzewski, Attorney
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, Arkansas 72203
(501) 371-2451

(CERTIFICATE OF SERVICE omitted in printing)

EXHIBIT C
[837]

A BILL

State of Arkansas
76th General Assembly
First Extraordinary Session, 1987 House Bill 1031
By: Representative Pat Hays

FOR AN ACT TO BE ENTITLED

"AN ACT TO REPEAL THE EXEMPTION FROM THE ARKANSAS GROSS RECEIPTS TAX FOR THE SALE OF RELIGIOUS, PROFESSIONAL, TRADE AND SPORTS JOURNALS AND/OR PUBLICATIONS; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. The exemption from the tax levied by the Arkansas Gross Receipts (Tax) Act levied by Act 386 of 1941, as amended, the same being Ark. Stat. Ann. §84-1901 et seq. which exempts from that tax the gross receipts or gross proceeds derived from the sale of religious, professional, trade and sports journals and/or publications printed and published within this State when sold through regular subscriptions which exemption was granted by the second paragraph of Section 1 of Act 152 of 1949, the same being the second paragraph of Ark. Stat. Ann. §84-1904(j) is hereby repealed.

SECTION 2. REPEALER. All laws and parts of laws in conflict herewith are hereby repealed.

PLAINTIFF'S EXHIBIT 12
(5-9-88)
[887]

DEPARTMENT OF FINANCE AND ADMINISTRATION
REVENUE POLICY STATEMENT 1988-1

In the case of Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. ____, 107 S.Ct. ____, 95 L.Ed. 209 (1987) the United States Supreme Court declared that the Arkansas Sales Tax Exemption for subscription sales of certain publications was unconstitutional. The Supreme Court held that because the

exemption discriminated between types of publications on the basis of content the exemption violated the first amendment right to free speech. As a result of this Supreme Court decision, subscription sales of publications, regardless of the type or content of the publication or the place printed or published, are no longer subject to Arkansas sales or use tax. The Revenue Division will no longer assess tax on subscription sales of these publications and taxpayers will no longer be required to report tax on purchases of these publications.

This Policy Statement shall be in effect on and after March 1, 1988.

Issued this 10th day of March, 1988, in the City of Little Rock, Arkansas.

/s/ Mahlon Martin
Mahlon Martin, Director
Department of Finance and
Administration

/s/ Jim C. Pledger
Jim C. Pledger
Commissioner of Revenues

PLAINTIFF'S EXHIBIT 13
(5-9-88)
[886]

DEPARTMENT OF FINANCE AND ADMINISTRATION
REVENUE POLICY STATEMENT 1988-3

In Revenue Policy Statement 1988-1 the Revenue Division stated that it would no longer assess Arkansas Sales or Use Tax on subscription sales of certain publications and that taxpayers will no longer be required to report tax on purchases of these publications. Since that policy statement was issued there has been some concern among taxpayers as

to what constitutes a subscription sale. The purpose of this policy statement is to clarify the meaning of subscription sales for all taxpayers. Arkansas Sales Tax Regulation No. GR-48(A)(VI) states:

> "The term "regular subscription" means the purchase by advance payment of a specified number of issues of a publication over a certain period of time, and delivered to the subscriber by mail or otherwise."

In order to come within the meaning of Revenue Policy Statement 1988-1 the subscription must meet the requirements of the above definition.

Issued this 30th day of March, 1988, in the City of Little Rock, Arkansas.

/s/ Mahlon Martin
Mahlon Martin, Director
Department of Finance and
Administration

/s/ Jim C. Pledger
Jim C. Pledger
Commissioner of Revenues

[Opinion of Pulaski County Chancery Court]

Printed as Appendix C, Petition for Certiorari Docket No. 90-29, pg. C-1

Printed as Appendix D, Petition for Certiorari, Docket No. 90-38, pg. 11a

[Order and Judgment of Pulaski County Chancery Court]

Printed as Appendix B, Petition for Certiorari, Docket No. 90-29, pg. B-1

Printed as Appendix C, Petition for Certiorari, Docket No. 90-38, pg. 9a

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
(caption omitted in printing)

ORDER
(Filed May 9, 1988)
(Filed May 9, 1990)

On this 9th day of May, 1988 is presented to the court, the Motion To Intervene by the City of Fayetteville, Arkansas. From said motion, and a review of the complete case file, the court finds:

1. That applicant's defense and the main action have common questions of law and fact.

2. The intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

IT IS, THEREFORE, ORDERED that the City of Fayetteville, Arkansas be permitted to intervene in this action.

/s/ Lee A. Munson
Chancellor

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION
(caption omitted in printing)

ORDER
(Filed March 21, 1989)

On the 17th day of March, 1989, a hearing was held to consider the plaintiffs' "Motion For Stay of Order Rescinding

Preliminary Injunction, Or, In The Alternative, For Modification Of That Order" filed on March 14, 1989 and the "Supplement" to said Motion filed on March 15, 1989. Present at the hearing were Mr. Eugene Sayre, attorney for plaintiffs; Mr. Joe Morphew, attorney for defendant Commissioner of Revenues; and Mr. Robert Parker, attorney for the City of Benton, Arkansas. From the Motion and Supplement thereto, argument of counsel, and all other matters presented, THE COURT FINDS:

1. On March 10, 1989, the Opinion of this Court was entered, wherein a final decision on the merits was rendered in favor of defendants herein. Pursuant to that Opinion and ARCP Rule 65, this Court dismissed the complaint of plaintiffs and dissolved the Preliminary Injunction entered herein on August 28, 1987, thereby releasing unto defendants all funds previously required to be deposited into an interest-bearing escrow account and removing all requirements and restrictions previously imposed against defendants.

2. The Court having rendered its final determination of the issues raised in this case after all such issues had been fully presented, briefed and argued, there exists no good cause for reinstating any provision of the Court's Preliminary Injunction entered on August 28, 1987, or modifying or rescinding any part of its Order And Judgment entered on March 13, 1989, there being an adequate remedy for plaintiffs if they were to ultimately succeed on appeal, and there being no probability or likelihood of plaintiffs' success on the merits since this Court has finally decided the merits of the case in favor of defendants based upon the state of the law announced by the Courts of this state and nation.

3. The Opinion entered by this Court on March 10, 1989 and the Order And Judgment entered by this Court on March 13, 1989 are final and dispose of all matters of fact and law herein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiffs' Motion For Stay Of Order Rescinding Preliminary Injunction, Or, In The Alternative, For Modification Of That Order and the Supplement thereto are denied in their entirety and that plaintiffs are not entitled to any relief upon the claims presented to this Court.

ENTERED this 21st day of March, 1989.

Signed for 1st Div. /s/ Ellen B. Brantley
Chancellor

IN THE CHANCERY COURT
OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

SUPPLEMENTAL NOTICE OF APPEAL
(Filed March 23, 1990)

Come now the representatives of the Plaintiff-class, by and through their undersigned solicitor, and file this Supplemental Notice of Appeal from: (1) the Order and Judgment entered herein on March 13, 1989, by the Honorable Lee A. Munson (which Order rescinded the Preliminary Injunction that was entered herein on August 28, 1987), and (2) the Order entered herein on March 21, 1989, denying the Plaintiffs' Motion for Stay or Modification of the Order of March 13, 1989, Rescinding the Preliminary Injunction entered on August 28, 1987. The Plaintiffs seek an expedited appeal on this limited issue (prior to the full appeal on the merits) in an attempt to secure a stay or modification of the Chancellor's Order of March 13, 1989, so as to avoid the irreparable harm the members of the Plaintiff-class will suffer if all or part of the requirements of the Preliminary Injunction of August 28, 1987, are not reinstated immediately, pending the full appeal in this case.

Supplemental Designation of Record

The representatives of the Plaintiff-class originally designated the entire record as the Record on Appeal in its Notice of Appeal filed herein on March 14, 1989. Since then the Chancellor in the trial court has denied the Motion of the Plaintiff-class to stay or modify the effect of the Court's Order of March 13, 1989, rescinding the Preliminary Injunction of August 28, 1987, and the Plaintiff-class has decided to seek an expedited and limited appeal to the Arkansas Supreme Court on the issues surrounding the release of the "escrow account" and the "special handling system" for Sales Tax Reports reflecting collections of the state and local Sales Taxes imposed by Act 188 of 1987 that were required by the Preliminary Injunction entered herein on August 28, 1987, which requirements were rescinded by the trial court's Order of March 13, 1989, pending the preparation of the record for the full appeal. Therefore, for purposes of both (1) this expedited and limited appeal to seek a stay or modification of the dissolution of the Preliminary Injunction previously entered and (2) the full appeal, the representatives of the Plaintiff-class modify their original designation of record and do hereby designate the following parts of the overall record, as the designated Record on Appeal:

* * *

Transcript Ordered

The solicitor for the Plaintiff-class hereby states that he has contacted the Court Reporter and has ordered preparation of the record and the transcript of all testimony given at any hearing or at the trial in this case, as required by the provisions of Rule 3(e) of the Arkansas Rules of Appellate Procedure.

Issues on Expedited Appeal

The statement of the points on which the representatives of the Plaintiff-class intend to rely upon their expedited and limited appeal, as required by the provisions of Rule 3(g) of the Arkansas Rules of Appellate Procedure, are as follows:

1. Should this Court stay and trial court's Order of March 13, 1989, rescinding the requirements of the Preliminary Injunction entered herein on August 28, 1987?

2. If the Supreme Court does not reinstate in full the requirements of the Preliminary Injunction entered herein on August 28, 1987, should the Supreme Court modify the trial court's Order of March 13, 1989, so as to reinstate the requirements of the Preliminary Injunction with regard: (1) to the escrowing of the local Sales Taxes imposed by Act 188 of 1987, and/or (2) to reinstating the "special handling system" for state and local Sales Taxes imposed by Act 188 of 1987, and to extend the reporting requirements of this "special handling system" to the State Treasurer, as well as the Commissioner of Revenues?

3. Should either of the actions requested by the Plaintiff-class in paragraphs 2 and 3, above, be taken with the waiver of any requirement of the posting of a bond on behalf of the Plaintiff-class?

Issues on Full Appeal

The statement of the points on which the representatives of the Plaintiff-class intend to rely upon for their full appeal, as required by the provisions of Rule 3(g) of the Arkansas Rules of Appellate Procedure, are as follows:

4. Did the enactment of Act 188 of 1987 cause the statutory scheme for imposing state and local Sales Taxes in Arkansas to discriminatorily impose such Sales Taxes on

charges made for cable television services, so as to single out both cable television system operators and cable television system subscribers for taxation (as opposed to other entities involved in the mass communications medium in Arkansas), so that such action violates the rights of free speech and free press guaranteed to the members of the Plaintiff-class by the First Amendment to the United States Constitution?

5. Do the provisions of Act 188 of 1987 cause the state and local Sales Taxes of the State of Arkansas to be discriminatorily imposed upon charges for cable television services in violation of the "equal protection" provisions of the federal and state constitutions?

6. Do the provisions of Act 188 of 1987, which impose the state and local Sales Taxes in the State of Arkansas, cause such taxes to be discriminatorily imposed upon charges for cable television services, so as to deny the members of the Plaintiff-class the "equality" of taxation guaranteed to them by the privileges and immunities provisions of Art. 2 § 18 of the Arkansas State Constitution?

7. Are the discriminatory state and local Sales Taxes imposed upon cable television service by the provisions of Act 188 of 1987 prohibited by the provisions of the Cable Communications Policy Act of 1984, so that such legislative action by the State of Arkansas violates the provisions of the Supremacy Clause of the United States Constitution?

8. Is the proper remedy in this case for the Court to strike and refund the state and local Sales Taxes imposed by Act 188 of 1987, if the Court finds such taxes are unconstitutional, rather than judicially extending the state and local Sales Taxes imposed in the State of Arkansas to charges made for "excluded" or "exempted" mediums of mass communication that have similar First Amendment protected rights of free speech and free press?

Respectfully submitted,

/s/ Eugene G. Sayre

Eugene G. Sayre
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SOLICITOR FOR PLAINTIFFS

(CERTIFICATE OF SERVICE omitted in printing)

[Opinion, Arkansas Supreme Court]

Printed as Appendix A, Petition for Certiorari, Docket No. 90-29, pg. A-1

Printed as Appendix B, Petition for Certiorari, Docket No. 90-38, pg. 3a

[Order of Arkansas Supreme Court denying Petitions for Rehearing]

Printed as Appendix D, Petition for Certiorari, Docket No. 90-29, pg. D-1

Printed as Appendix A, Petition for Certiorari, Docket No. 90-38, pg. 1a

IN THE SUPREME COURT OF ARKANSAS

DANIEL L. MEDLOCK, et. al. APPELLANTS

VS. NO. 89-89

JAMES C. PLEDGER, et. al. APPELLEES

CITY OF FAYETTEVILLE, ARKANSAS INTERVENOR

PETITION FOR REHEARING
(Filed March 16, 1990)

Come now the Appellees, James C. Pledger, Commissioner of Revenues; Jimmie Lou Fisher, Treasurer of the State of Arkansas; Donald Venhaus, County Judge, Pulaski County, Arkansas; Patricia Tedford, Treasurer, Pulaski County, Arkansas; and Pulaski County, Arkansas; and Pulaski County, Arkansas, by and through their respective counsel, who respectfully petition the Court to rehear the issues in this case because the opinion contains the following error of law:

The opinion found that the Arkansas Gross Receipts Tax on cable television service was discriminatory and thus in violation of the First Amendment to the U.S. Constitution because the tax was not applied to the charges for the unscrambling of satellite television programming, which the Court found to be a similar service. However, this finding of discrimination was made without taking into consideration the argument of Appellees, based on facts contained in the record, that Appellees had no previous knowledge that the services were similar, and thus had no discriminatory intent.

WHEREFORE, premises considered, Appellees pray that the Court rehear this cause.

Respectfully submitted,

JAMES C. PLEDGER, APPELLEE

BY: /s/ William E. Keadle
WILLIAM E. KEADLE
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, AR 72203
Attorney for Appellee Pledger

JIMMIE LOU FISHER,
APPELLEE

BY: /s/ Frank J. Wills, III
FRANK J. WILLS, III
Assistant Attorney General
200 Tower Building
Fourth and Center Streets
Little Rock, AR 72201

DONALD VENHAUS,
PATRICIA TEDFORD,
PULASKI COUNTY, ARKANSAS

BY: /s/ Larry D. Vaught
LARRY D. VAUGHT
Pulaski County Attorney
Room 217, Wallace Building
Little Rock, AR 72201

CERTIFICATE OF MERIT

The undersigned counsel for Appellees certify that they believe there is merit to this petition for rehearing and that it is not filed for the purpose of delay.

/s/ William E. Keadle
WILLIAM E. KEADLE

/s/ Frank J. Wills
FRANK J. WILLS, III

/s/ Larry D. Vaught
LARRY D. VAUGHT

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Come now the Appellees, and for their Brief in Support of the Petition for Rehearing filed herein, state as follows:

At Page 10 of the Argument portion of Appellees' Brief, it is stated:

> "... As far as satellite television is concerned, it was not until the trial in the Court below that any of the Appellees, the General Assembly or, we submit, any lay person had ever heard of the collection of charges for satellite television service. It is still not clear how that occurs, but apparently there are limited circumstances where charges are made to satellite dish owners for the ability to receive certain transmissions . . . ."

This argument is supported at Page 103 of Appellants' Abstract, where the testimony of Gail Price, then Manager of the Sales and Use Tax Section of the Arkansas Department of Finance and Administration, is abstracted as follows:

> "About 8 or 10 years ago, I participated in meetings at the Revenue Department concerning the taxation of cable television services and it was considered in that framework to be a taxable service already within the law as it existed (R. 1008-1009). The Revenue Division waited for the legislature to change the Sales Tax law to add cable television as a designated taxable service, because we just considered it another service that was taxable and we decided to wait so that it would be clear that it would be included within the statute. There was never any indication or statement made that cable television was gong to be singled out for special tax treatment, it was just another service they were trying to make taxable." (TR 1010)

Consequently, as is pointed out by Appellants in their brief, the General Assembly acted in the next legislative session after the trial and adopted Act 769 of 1989, which extended the state and local sales tax to charges made for "scrambled" satellite broadcast television subscription services sold to an Arkansas citizen, further evidencing a lack of prior knowledge that a charge was collected with regard to satellite television service.

In this case, as in many, the constitutionality of an Act depends on the existence or non-existence of certain facts. If, for instance, a gross receipt producing satellite television service did not exist, then the Court would find Act 188 of 1987 constitutional since cable television has been found to be distinguishable from the print media. Act 188 was deemed unconstitutional only because satellite television is similarly situated to cable television in that both deliver essentially the same message and both have gross receipts for a sale of the service. The only difference between Act 188 of 1987 and Act 769 of 1989, which the Court found constitutional, is the added element of unscrambled satellite television.

The record indicates, and the Appellees argued in both the brief and oral argument, that the legislature was not aware of a gross receipt producing satellite television service when Act 188 was passed. When legislative findings of fact are relevant to a judicial determination, such findings are entitled to due respect. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the lawmaking body may rationally believe such facts to be established. *Re: Yun Quong*, 195 Cal. 508, 114 P. 835.

Cable and satellite television are rapidly growing and changing industries. The testimony of Appellants' own witnesses indicate a great deal of litigation over cable television in the last 15 years (R. 707-708). Cable service of a

general nature in Pulaski County was less than 10 years old when this lawsuit was filed. It is certainly not unheard of for the government and the legislature to lag behind in developing regulation and taxation of new and rapidly developing industries. The legislature passed Act 188 of 1987 in reaction to the "new" cable television industry to collect a tax on a definable service. When the State "discovered" a gross receipt producing satellite television industry through testimony in this case, Act 760 of 1989 was passed. Surely the Court cannot expect the legislature to anticipate new industries before they are known to exist.

At no place in the Court's opinion issued herein is any statement contained which would show that Appellees' argument in this regard was considered. It is clear from the record and the parties' briefs that the General Asembly acted at the earliest opportunity to correct what was suggested to be, but at the time neither proven to be, nor now admitted by Appellees to be, a difference in the tax treatment of two similar services, cable television service and satellite service.

It might be argued that lack of discriminatory intent on the part of the General Assembly should not be considered relevant as long as the resulting legislation has a discriminatory effect. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 421, 95 L.Ed.2d 209, 107 S.Ct. 1722 (1987), the U.S. Supreme Court states:

> "Both types of discrimination can be established even where, as here, there is no evidence of an improper censorial motive . . . This is because selective taxation of the press - either singling out the press as a whole or targeting individual members of the press - poses a particular danger of abuse by the State." (95 L.Ed.2d at 219)

However, the issue argued in this Petition goes beyond merely whether the General Assembly had a discriminatory intent. Again, it is submitted that the relevant issue for

purposes of this Petition is whether there was knowledge by the General Assembly that another similar class of individuals to the class of taxpayers affected even existed at the time the Act was enacted.

Without giving consideration to the fact that the General Assembly can only enact legislation with regard to what is known, the Court's opinion places an impossible standard to follow in enacting non-discr minatory taxation legislation. This decision would require the General Assembly to be clairvoyant with regard to the ever-advancing technology and competition in this and other scientific fields, so that such legislation will not be found in the future to be discriminatory as to classes of taxpayers which are suddenly placed in a situation which makes a previously dissimilar class of taxpayers similar.

For the above reasons, Appellees' Petition for Rehearing should be granted.

Respectfully submitted,

JAMES C. PLEDGER,
APPELLEE

BY: WILLIAM E. KEADLE
Revenue Legal Counsel

JIMMIE LOU FISHER,
APPELLEE

BY: FRANK J. WILLS, III
Assistant Attorney General

DONALD VENHAUS,
PATRICIA TEDFORD,
PULASKI COUNTY, ARKANSAS

BY: LARRY D. VAUGHT
Pulaski County Attorney

BY: /s/ William E. Keadle
WILLIAM E. KEADLE

(CERTIFICATE OF SERVICE omitted in printing)

IN THE SUPREME COURT OF ARKANSAS

DANIEL L. MEDLOCK, et. al. — APPELLANTS

VS. — NO. 89-89

JAMES C. PLEDGER, Commissioner of Revenues; et. al. — APPELLEES

CITY OF FAYETTEVILLE, ARKANSAS — INTERVENOR

APPELLANTS' PETITION FOR REHEARING
(Filed March 19, 1990)

Come now the representatives of the Appellant-class of taxpayers and cable television operators, and hereby file their Petition for Rehearing (in brief form), in accordance with the provisions of Rule 20 of the Rules of the Arkansas Supreme Court, requesting the Court (1) to modify the Court's opinion of February 28, 1990, so as not to foreclose the Appellants from an opportunity for an evidentiary challenge to the provisions of Act 769 of 1989, and (2) to reconsider its very narrow comparison of similarly situated businesses in the mass communications media for purposes of applying the First Amendment rationale decreed by the United States Supreme Court.

I. THIS COURT'S OPINION SHOULD BE MODIFIED SO AS NOT TO FORECLOSE THE APPEL-

LANTS' RIGHT TO EVIDENTIARILY CHALLENGE THE PROVISIONS OF ACT 769 OF 1989 (WHICH AMENDED ACT 188 OF 1987), EITHER ON REMAND IN THIS CASE, OR IN A SEPARATE ACTION.

The Appellants respectfully request the members of this Court to modify the opinion entered in this case on February 28, 1990, so as not to approve the amendment of Act 188 of 1987 by the adoption of Act 769 of 1989, without allowing the Appellants an opportunity to evidentiarily establish the constitutional infirmities of Act 769 of 1989. On page 1 of the Court's opinion, it is stated that the Sales Tax was illegal, but "its illegality has been cured." However, the Court then notes on pages 3 and 6 of its Opinion that Act 769 of 1989 did not become law until after the Chancellor's ruling in the trial court, and, therefore, Act 769 of 1989 was *not* before the trial court in this case.

The Appellants submit that, because of the very fact that Act 769 was not before the trial court, this Court's stamp of approval upon the constitutionality of Act 769 is a premature decision that has been made without any basis in the evidentiary record to support such a holding, and such holding may give rise to a claim of "collateral estoppel" or "res judicata" by the State to any attempt of the Appellants to evidentiarily challenge the constitutionality of Act 769 of 1989 in the future.

As noted in the Appellants' original brief,[1] the adoption of the language used in Act 769 of 1989 may have lessened the unconstitutional discrimination regarding the imposition of a state excise tax upon charges for these similar services, but the Appellants should not be foreclosed from the opportunity to evidentiarily establish that the enactment of Act 769 of 1989 did not eliminate this unconstitutionally discriminatory application of the state's excise taxes upon

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[1]Appellants' Opening Brief, pp. 161-162, ftnt. 20.

charges made for providing these similar electronic programming services to Arkansas subscribers.

Arkansas' Sales Tax is an "excise" tax upon sales made within the borders of the State of Arkansas. Arkansas' Use Tax is a compensating "excise" tax that is imposed upon the use, storage or consumption of property purchased outside of the boundaries of the State of Arkansas but used, stored or consumed within the state. Arkansas' Sales Tax may not be imposed upon a sale that is completed in another taxing jurisdiction, especially where the sale is one made in interstate commerce.[2]

Since Act 769 of 1989 did not even come into existence until March 21, 1989,[3] the Appellants had no opportunity to introduce evidence in the trial court of the continued lack of the imposition of an Arkansas "excise" tax upon charges for "scrambled" satellite television programming services provided to Arkansas consumers by out-of-state based satellite broadcast services. In the vast majority of instances, Arkansas subscribers to "scrambled" satellite television broadcast services secure such services by calling a toll-free "800" number of an out-of-state located "scrambled" satellite television broadcast provider, and then the Arkansas subscriber sends the payment for such "scrambled" satellite broadcasting services directly to the out-of-state based provider. Therefore, the sale in such a situation is completed in interstate commerce at the place where the Arkansas

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[2]See, *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), affirming, 205 Ark. 780, 171 S.W.2d 102 (1943); and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967).

[3]Act 769 of 1989 was signed into law eleven days after the entry of the Opinion by the Chancellor in the trial court below, and some ten months after the evidentiary record was closed at the trial of this case in May of 1989.

subscriber's check is received and negotiated, e.g. Dallas, Texas; Atlanta, Georgia; New York City, etc.[4]

This Court specifically noted in its Opinion that Paul Gardner had testified that Community Communications Company's sale of "scrambled" satellite television services to Arkansas subscribers was not taxable under the provisions of Act 188 of 1987. The amendment to Act 188 of 1987 by the adoption of Act 769 of 1989 merely extended Arkansas' Sales Taxes to sales where local cable operators act as "collecting agents" for the out-of-state "scrambled" satellite television service providers. The Appellants submit that they should be given the opportunity to evidentiarily establish that such situations are far in the minority, and that in the majority of instances the Arkansas subscribers' payments are being made directly to an out-of-state "scrambled" satellite service provider.[5] This Court must note that Arkansas' Compensating Tax Act (Ark. Code Ann. § § 26-53-101—26-53-131) does not impose a Compensating (Use) Tax (i.e. "excise" tax) upon *any* "services" that are provided to Arkansas customers by out-of-state providers.[6]

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[4]See the Affidavits of Diane F. Davis, an Arkansas "scrambled" satellite television broadcast service subscriber, and Jeff Kupsky of Turner Broadcasting Systems, Inc. that are attached as Appendices I and II, respectively. These affidavits are submitted solely for the limited purpose of establishing to the members of this Court that their approval of the constitutionality of Act 769 of 1989 is premature and an evidentiary question exists as to whether or not the adoption of Act 769 of 1989 has cured the constitutional infirmity of the imposition of Arkansas' "excise" taxes upon the charges for these similarly situated television programming services. The Appellants submit that they should not be estopped from having the opportunity to establish an evidentiary record of such facts on remand in this case or in a separate action.

[5]See the Affidavits of Paul Q. Gardner, Appendix III, and Diane F. Davis, Appendix I, attached hereto.

[6] The Appellants note that Justice Marshall, in his opinion in the case of *Goldberg v. Sweet*, 109 S. Ct. 582, 589-590 (1989) specifically held, in questioning whether a state had the ability to impose a tax for the privilege of receiving an electronic transmission, that:

> "We also doubt that the termination of an interstate telephone call, by itself, provides a substantial enough nexus for a state to tax a call."

The General Assembly's imposition of Arkansas' Sales Taxes upon charges for both "scrambled" satellite and cable television services does not cure the constitutional infirmity of Arkansas' statutory scheme of "excise" tax imposition, especially when the Arkansas subscriber to "scrambled" satellite services can avoid the state and local Sales Taxes entirely, merely by choosing to pay for these services directly to the out-of-state provider, i.e. a method of payment that is not even subject to Arkansas' Sales Tax.

The Appellants have also alleged an equal protection clause violation because of Arkansas' statutory scheme of "excise" taxation of these similarly situated television programming services. This Court has already found that such services affect a "fundamental" constitutional right, i.e. "free speech" and "free press," both of which are protected by the First Amendment. Therefore, under the decisions of the United States Supreme Coiurt in both *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983) and *United States v. O'Brien*, 391 U.S. 367 (1968), the Appellants submit that the burden of proof should be placed upon the State of Arkansas to show a compelling reason why its statutory scheme of Sales Tax and Use Tax imposition can pass constitutional muster where it allows the vast majority of the charges for "scrambled" satellite television broadcast services to Arkansas consumers to be made "excise" tax free, while charges for virtually the identical cable television programming services or charges for some satellite services (where cable system operators act as "collecting agents" for an out-of-state based "scrambled"

satellite television subscription service providers) are subjected to the state's "excise" taxes.[7]

Therefore, the Appellants submit that this Court's Opinion of February 28, 1990, must be modified so as not to prematurely rule upon the constitutionality of Act 769 of 1989. The Appellants must be allowed to present evidence, on remand in this case or in a separate action, that such legislative action has not cured the constitutional infirmity which this Court has found exists in its review of Arkansas' statutory scheme for imposing the state's "excise" taxes upon charges for these similarly situated television programming services.

II. THE COURT SHOULD RECONSIDER ITS NARROW COMPARISON OF SIMILARLY SITUATED TAXABLE ENTITIES FOR FIRST AMENDMENT PROTECTION COMPARISON PURPOSES, SO AS TO GIVE A BROADER AND MORE COMPREHENSIVE APPLICATION OF THESE FIRST AMENDMENT PROTECTED RIGHTS IN CHALLENGES TO STATE TAXES AS HAVE THE APPELLATE COURTS OF ARKANSAS' SISTER STATES.

In its Opinion of February 28, 1990, this Court has made a very narrow comparison of what are "similarly situated"

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[7]The Appellants submit that the Revenue Division of the Arkansas Department of Finance and Administration has already recognized this constitutional infirmity for First Amendment protected businesses operating in Arkansas. After the decision by the United States Supreme Court in *Arkansas Writer's Project, Inc. v. Ragland*, 107 S.Ct. 1722 (1987), and the General Assembly's refusal (on two occasions) to repeal the exemption questioned in that case (PX 7, A. 74-75, R. 835-837 and A. 132, R. 649-652), the Revenue Division issued Revenue Policy Statements 1988-1 and 1988-3 (PX 12 and PX 13, A. 105-106, R. 1016) that administratively recognized that Arkansas could not constitutionally impose a Use Tax on out-of-state published magazines sold by subscription, when no in-state published magazines sold by subscription were subjected to the state's Sales Tax.

businesses that enjoy the First Amendment protection of "free speech" and "free press" for purposes of determining whether or not Arkansas' state and local Sales Taxes have been "discriminatorily" imposed upon the charges for such services. This Court specifically noted (page 6) that the Appellants have cited no United States Supreme Court case that holds that the failure to tax the print and radio segments of the mass communications media the same violates the First Amendment guaranteed rights of "free speech" and "free press."

The Appellants do point out that no such question has ever been submitted to the Supreme Court, but that in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986), the Supreme Court has drawn a very close similarity between the First Amendment rights to be afforded cable television as compared to those of the print media. In that decision, Chief Justice Rehnquist held (106 S.Ct., at 2037-38):

> "We do think that the activities which Respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges:
>
> > "The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content.
>
> Thus, through original programming or by exercising editorial discretion over which station or programs to include in its repertoire, Respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted

> that cable operators exercised "a significant amount of editorial discretion regarding what their programming will include." . . . Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers and pamphleteers . . . (Citations omitted)

In two recent opinions implementing the First Amendment rationale of the Supreme Court decision in *Minneapolis Star, supra*, both the highest appellate courts of the States of Oklahoma and New York have given a much broader interpretation of these First Amendment rights in instances in which the taxpayers have questioned the constitutionality of state taxes than has this Court in this appeal.[8] The evidentiary record in this case well establishes the similarities between the "print" segment of the mass communications media and the "cable television" segment of the same mass communications media.[9]

The *Dow Jones* and *McGraw-Hill* decisions in Oklahoma and New York were rendered after the oral argument in this case on January 29, 1990. Therefore, the Appellants submit that this Court should abandon the very narrow test it has adopted for comparing similarly situated First Amendment protected businesses and, instead, should adopt guidelines that apply much broader utilization of the Supreme Court's rationale in the *Minneapolis Star* decision when comparing

---

[8]See the opinion of the Oklahoma Supreme Court in *Dow Jones & Co. v. Oklahoma Tax Commission*, ____ P.2d ____ (1990), Vol. 61 Okla. B.J. 253 (1990) and the decision of the New York Court of Appeals in *McGraw-Hill, Inc. v. State Tax Commission*, ____ N.E.2d ____ (1990) affirming the Appellate Division of the Supreme Court at 541 N.Y.S.2d 253 (Ap. D. 3 Dept., 1989). In the *McGraw-Hill* case, the New York court specifically found that the differential in the taxation of print and electronic segments of the mass communications media brought the *O'Brien* test into play, and shifted the burden of proof to the state to show what "compelling governmental interest" was served by this differential taxation.

[9]See the testimony of Messrs. Blount, Tucker and Deyo at A. 56-57, 63, 67, 82-84, 97-99.

the taxation of charges for the print media segment and the cable television segment of the mass communications media. Thus, on re-examination, the Appellants submit that this Court should adopt a broader rationale of the Supreme Court's *Minneapolis Star* decision, and find that cable television and magazines and newspapers are similarly situated and must be subjected to Sales Taxes in the State of Arkansas in the same manner.

CERTIFICATE

The undersigned counsel for the Appellants certifies that he believes there is merit to this Petition for Rehearing and that it has not been filed for the purpose of delay.

Respectfully submitted,

/s/ Eugene G. Sayre

Eugene G. Sayre, No. 75111
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(Appendices I, II and III Stricken by Order of Arkansas Supreme Court)

[Order of Arkansas Supreme Court denying Petitions for Rehearing]

Printed as Appendix D, Petition for Certiorari, Docket No. 90-29, pg. D-1 .....

Printed as Appendix A, Petition for Certiorari, Docket No. 90-38, pg. 1a. .....

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 1, 1990

Mr. William E. Keadle
7th and Wolfe Streets
P.O. Box 1272-L
Little Rock, AR 72203

Mr. Eugene G. Sayre
3400 TCBY Tower
Little Rock, Arkansas 72201

Re: James C. Pledger, Commissioner of Revenues of Arkansas
v. Daniel L. Medlock, et al.
No. 90-29
Daniel L. Medlock, et al.
v. James C. Pledger, Commissioner of Revenues, et al.
No. 90-38

Dear Mr. Keadle and Mr. Sayre:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted. The cases are consolidated and a total of one hour is allotted for oral argument.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 90-29, 90-38

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES C. PLEDGER
PETITIONER
v.
DANIEL L. MEDLOCK, et. al.
RESPONDENTS
and
DANIEL L. MEDLOCK, et. al.
PETITIONERS
v.
JAMES C. PLEDGER
PETITIONER

CONSOLIDATED CASES

On Writ of Certiorari to the Arkansas Supreme Court

BRIEF FOR PETITIONERS IN DOCKET NO. 90-38

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For Petitioners in
Docket No. 90-38
and for Respondents in
Docket No. 90-29

PARAGON PRINTING & STATIONERY COMPANY, INC

QUESTIONS PRESENTED

1. Under the provisions of the First Amendment, is the State of Arkansas unconstitutionally imposing its Sales Taxes upon the purchases and sales of cable television services by the respective cable television subscribers and operators who are members of the petitioner-class, because subscribers and sellers of similarly situated goods or services in the electronic and print segments of the mass communications media are not being charged these same Sales Taxes by the State of Arkansas?

2. For purposes of applying Arkansas' general Sales Tax and determining what entities are "similarly situated," what are the First Amendment standards to be applied to the rights of cable television operators and subscribers, when compared to the standards already established by this Court to protect the First Amendment rights of those engaged in other businesses involved in both the electronic and print segments of the mass communications media?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioners are cable television operators and subscribers who are representatives of a certified class of taxpayers that are subjected to the state and local Sales Taxes imposed by Act 188 of 1987, as amended by Act 769 of 1989, and include the following named Plaintiffs:

Petitioner Daniel L. Medlock is an individual, a subscriber to cable television services, and a resident of Little Rock, Pulaski County, Arkansas.

Petitioner Community Communications Company is an independent corporation that has no subsidiaries or affiliates, and which operates six cable television franchises in south and southeast Arkansas.

Petitioner Arkansas Cable Television Association, Inc. (ACTA) is an independent not-for-profit corporation that has no subsidiaries or affiliates, and is a trade organization composed of the operators of approximately 80 cable television systems in Arkansas.

Respondents are officials of state or local governmental entities wherein Arkansas' state and local Sales Taxes are imposed and these individuals are defendants in their official capacities, as follows:

Respondent James C. Pledger is the former Commissioner of Revenues of the Revenue Division of the Arkansas Department of Finance and Administration and the person who is charged by statute with administering the state and local Sales Taxes imposed in Arkansas.

Respondent Jimmie Lou Fisher is the Treasurer of the State of Arkansas and the person who is charged with disbursing funds to state agencies and to county and municipal governmental entities.

Respondents Donald Venhaus and Patricia Tedford are, or were, the County Judge and Treasurer, respectively, of Pulaski County, Arkansas, a county wherein a county-wide local Sales Tax is imposed.

Respondent Joann Boone is the Treasurer of the City of Benton, Arkansas, a municipality wherein a local municipal Sales Tax is imposed.

Respondent City of Fayetteville, Arkansas, an intervenor, is a municipal corporation wherein a local municipal Sales Tax is imposed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES C. PLEDGER
PETITIONER
v.
DANIEL L. MEDLOCK, et. al.
RESPONDENTS
and
DANIEL L. MEDLOCK, et. al.
PETITIONERS
v.
JAMES C. PLEDGER
PETITIONER

CONSOLIDATED CASES

On Writ of Certiorari to the Arkansas Supreme Court

BRIEF FOR PETITIONERS IN DOCKET NO. 90-38

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (App. B, p. 3a, Petition in Docket No. 90-38) is reported at 301 Ark. 483, 785 S.W.2d 202. The Order of the Supreme Court of Arkansas denying the petitions for rehearing is unreported (App. A, p. 1a, Petition in Docket No. 90-38).

The Opinion (App. D, p. 1a, Petition in Docket No. 90-38) and Order and Judgment (App. C, p. 92, Petition in Docket No. 90-38) of Chancellor Lee A. Munson of the Pulaski County Chancery Court are unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. B, p. 3a, Petitions in Docket No. 90-38) was rendered on February 28, 1990, and timely filed Petitions for Rehearing by both the Petitioners and the Respondents were filed and denied on April 2, 1990 (App. A, p. 1a, Petition in Docket No. 90-38). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

U.S. Constitution:

Amendment 1. Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Statutes:

Ark. Code Ann. § 26-52-301(3)(D), as amended, (Sales Tax on Cable Television Services), and Ark. Code Ann. § 26-52-401 (Exemptions from Sales Tax) are set forth in the Petition in Docket No. 90-38, App. E, pp. 23a-25a.

Ark. Code Ann. § 26-53-106, as amended, (Use Tax imposition Statute) is set out in the Petition in Docket No. 90-38, App. F, pp. 26a-27a.

These statutes are set forth at length in Appendices E and F to the Petition in Docket No. 90-38.

STATEMENT OF THE CASE

Statutory Scheme for Sales Taxes. Since 1941, Arkansas has imposed a permanent Sales Tax and, since 1949, has imposed a corresponding Compensating (Use) Tax. The sale or consumption of *all* tangible personal property in Arkansas is subject to either the Sales or Use Taxes, unless specifically exempted. However, there are only certain enumerated services that are subjected to the Sales Taxes, while no services are subjected to Arkansas' Use Taxes. (JA 177-182) Since 1981, countywide and citywide Sales and Use Taxes have been imposed, on a local option basis, upon the sale or consumption of items to which the state Sales or Use Taxes Use Taxes apply. The Arkansas General Assembly adopted Act 188 of 1987 (App. G, p. 28a, Pet. for Cert. Dkt. No. 90-38), effective July 1, 1987. This Act imposed, for the first time, Arkansas' state and local Sales Taxes upon charges made by cable television operators in return for providing cable television services to subscribers in Arkansas. No amendment was made to Arkansas' Use Tax statutes by Act 188 of 1987 (JA 118-124).

Upon the effective date of Act 188, Arkansas' statutory scheme for imposing Sales and Use Taxes upon the sale of goods or services by businesses involved in the mass communications media in Arkansas imposed the Sales Tax upon cable television service; and books and magazines sold over the counter (but not by subscription); upon the sale or rental of video tapes; and upon the admission charge to movie theatres. The sales of newspapers and the sale of advertising in newspapers and on billboards were specifically exempted from Arkansas' Sales and Use Taxes. Likewise, either by statutory interpretation, administrative ruling, or because of this Court's decision in the case of *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 21 (1987), the sale of magazines by subscription (printed within or without the State of Arkansas) were exempted from the imposition of Arkansas' Sales and Use Taxes. (JA 118-123, 183-188) The sale of "scrambled" satellite television broadcast programming to home dish-antenna

owners for a subscription fee and the advertising sold to sponsor local wireless broadcast radio and television services were simply not mentioned by Arkansas' Sales and Use Tax statutes, and, therefore, were "excluded" from the tax base for these two excise taxes (JA 118-120, 183-188).

Constitutional Challenge to Act 188 of 1987. In late May of 1987, before the Sales Taxes imposed by Act 188 upon the sale of cable television services became effective, Daniel L. Medlock, a cable television subscriber; Community Communications Company, a cable television operator with six (6) franchise systems in Arkansas; and the Arkansas Cable Television Association, Inc. (ACTA), a trade organization composed of approximately 80 cable operators with cable systems operating throughout the State of Arkansas, instituted this class action suit in the Pulaski County Chancery Court to contest the constitutionality of the state and local Sales Taxes then to be imposed for the first time upon the charges for cable television service. (JA 1-16, 85, and 108)

The Petitioners' Complaint alleged that cable television services were singled out, among other businesses that were involved in both the print and electronic segments of the mass communications media in Arkansas, by the imposition of these state and local Sales Taxes. The Petitioners alleged that cable television delivered news, information and entertainment to its subscribers and sought to communicate these messages on a wide variety of topics and in a wide variety of formats. The cable system operators alleged that their activities in cablecasting this news, information and entertainment caused them to be engaged in the communication of ideas, expressions, philosophies and news, which activities were protected by the rights of free speech and free press guaranteed by the First Amendment of the U.S. Constitution. The Petitioners further alleged that their electronic communications were the same as the messages communicated in the goods and services sold by wireless television and radio broadcasters, satellite television broadcasters, and newspapers and magazines operating in Arkansas, and therefore, their sale of cable services should be

deemed to have the same First Amendment protected status as the sale of the goods and services by these other businesses engaged in the electronic and print segments of the mass communications media. (Second Amended Complaing, ¶ ¶ 17-19, JA 12)

The Petitioners specifically alleged in their Complaint that the adoption of Act 188 of 1987 and the resulting imposition of Arkansas' Sales Tax upon the sale of cable television services violated (1) their First Amendment rights of free speech and free press; (2) their rights to equal protection of the laws under the Fourteenth Amendment of the U.S. Constitution; and (3) the supremacy clause of the U.S. Constitution, because Congress preempted this area of law by specifically stating in the Cable Communications Policy Act of 1984 (47 U.S.C. § 542) that no state or local excise tax could be discriminatorily applied against cable television service. (Second Amended Complaint, ¶ 16, JA 10-12) The Defendants (representatives of the Arkansas Revenue Division, the State Treasurer and the cities and counties where local Sales Taxes were imposed) filed answers generally denying the allegations in the Petitioners' Complaint, and most of them specifically denied that the activities of communicating messages or ideas by the sale of cable services had any First Amendment protections. (JA 16-27)

Class Action and Escrow Account. Following an evidentiary hearing on Petitioners' Motions for Preliminary Injunction (i.e. request for escrow account) and Certification of the Action as a Class Action, the Chancellor entered an Order on Pending Motions (JA 29-34) wherein he made specific findings that the Petitioners' complaint raised common questions of fact and law and that the escrow account request should be established. Pursuant to these findings, the Chancellor ordered the challenged state and local Sales Taxes to be escrowed and the State Revenue Division was mandatorily enjoined to keep separate records so as to identify the payors and the monthly collections of the Sales Taxes imposed by Act 188. (JA 34-37) A specificc order was entered

certifying this matter as a class action, with the Community Communications Company representing some 100 cable operators in the State of Arkansas and Daniel L. Medlock representing some 400,000 cable television subscribers. (JA 38-40) After issuance of the notice of class certification, the City of Fayetteville, Arkansas, was allowed to intervene as a Defendant. (JA 44-47)

Evidentiary Record. At the evidentiary hearing on the Motions for Preliminary Injunction and Class Certification, and at the trial of this case, extensive testimony and documentary evidence were introduced by the Petitioners regarding the ownership and operation of cable television systems; the programming available and the programming choices made by cable operators; how cable television services compared with similar services or goods provided by both the print (newspaper and magazine) and the wireless broadcast (radio and television) segments of the mass communications media in Arkansas; and the imposition of Arkansas' state and local Sales and Use Taxes upon the goods or services sold by these various types of businesses engaged in the mass communications media in Arkansas. This testimony and documentary evidence can be generally summarized as follows:

(a) *Cable Industry in Arkansas.* As of the time of trial in May of 1988, there were approximately 100 separate cable television systems operating in approximately 300 separate communities in the state, and there were more than 400,000 separate subscribers to these cable television services. The largest cable system had approximately 68,000 subscribers, the smallest had approximately 120 subscribers, and the average cable system had approximately 4,300 subscribers. The smallest number of channels offered by any cable system was 12, with the average system offering 32 separate channels. Suscription fees generally ran between $15 and $20 per month, per subscriber, and approximately 80 of the 100 cable system operators were members of the ACTA. (JA 48-57) The cable television operators in Arkansas were required to pay the state's general Income Taxes, local Property Taxes, and the

state's Sales and Use Taxes that were imposed upon these operator's purchases of taxable goods or services. (JA 91-92)

(b) *Cable System Operations and Programming Availability.* Though some systems in Arkansas were larger and more sophisticated than others, all cable systems could be described as having facilities to receive electronic programs at their satellite dish antenna (earth station) that were beamed to them by the programming supplier through a geo-stationary satellite. The program signal was then placed into the "headend" at the cable operator's receiving station, transmitted along the cable operator's lines within the municipality, the signal was amplified approximately every mile, and the programming signals were delivered to the convertor at the subscriber's home. (JA 53-54, 56-5, 74-75) Jerry Bryars, Past President of ACTA, testified that the technology was now available to stack 100 or more channels on the low frequency coaxial cable for delivery of programming to the subscribers' homes. (JA 115) In more metropolitan areas, the subscriber penetration (i.e. percentage of subscribers compared with number of potential subscribers) ran from 50% to 55%, while in more rural and mountainous areas, where wireless broadcast television reception was poor or unavailable, cable subscriber penetration ran 90% or more. (JA 156, 172) A number of the cable systems in Arkansas are operated by companies that own more than one system, and are generally referred to multiple system operators (MSOs). (JA 51, 97-98, 106-108, 111-112, and 143-145) The delivery of programming services by the cable operator was generally on two levels, with a "basic" level of programming consisting of 20 or more channels for a set price (e.g. $15.00 per month), and then a "premium" level of services (e.g. HBO, Showtime, Cinemax, The Movie Channel, etc.) being charged for separately (e.g. $8.00 per month). (JA 52-53, 75-77) In addition, in the "addressable" cable systems,[1] the cable

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[1]These are more sophisticated systems where the subscriber can call the operator and arrange for a one time viewing of a specific event, such as a prize fight, a concert, etc. The cable operator will code the signal for this specific programming so that the subscriber's converter will be able to pick up that signal at the appointed time the "special program" is being transmitted.

operator would offer a pay-per-view (PPV) service, which allowed the cable subscriber to choose, on an ala carte basis, certain special programming at an additional cost. (JA 55, 75-77)

(c) *Governmental Franchise and Franchise Fee.* Since the cable operators have to make use of the public right-of-ways to either string or bury their coaxial cables to provide the programming service from their "headend" to the subscribers' converters, each cable operator secures a franchise for a specified geographic area, usually from a municipal government. In this franchise agreement, the cable operator generally agrees to meet minimum requirements with regard to insurance, the use and maintenance of the public right-of-ways, etc., and, in many instances, the operators have agreed to provide a number of "access channels" for the use of local government, religious and educational organizations, etc. without further cost to the users of such channels. In return for the use of the public right-of-ways, the cable operators negotiate with each community to pay a monthly "franchise fee" for the use of these public right-of-ways. (JA 59-60, 73, 79, 97-98)

(d) *Cable Television's Original Programming Services.* The cable operators testified that there was original programming that they produced, or which was produced strictly for cable television systems, which programming was not generally available on wireless broadcast television. This "original programming" may have been local, statewide or national in scope, and its form ran from messages conveyed on the simplest community bulletin boards and local weather bars up to 24 hour coverage of national and international news. Some of the "local" programming that was originated by the cable operators in Arkansas were the cablecasting of city council and school board meetings, local church services, high school football games, local newscasts by high school journalism students, coverage of local festivals and parades, and the communication of original plays written for presentation on local cable systems only. (JA 58, 59, 65, 70-72, 78, 93-94, 117-118, 150, 155, 162)

With regard to "statewide" programming, a two minute long video tape (PX 4 [R. 831], JA 61-62) was introduced and played at the trial. This video tape portrayed examples of statewide vocational training, agricultural programming, etc. that were produced solely for, and made available only over, cable systems, at the option of the individual cable operator.

On a "national" level, the cable operators testified about their cablecasting of C-SPAN I and II (gavel to gavel coverage of the Senate and House of Representatives of the U.S. Congress)[2]; the Weather Channel (a 24 hour per day national weather service); Cable News Network (a 24 hour per day network devoted exclusively to news coverage, both nationally and internationally); CNN Headline News (a 24 hour per day network devoted strictly to news, but repeating its summary format every 30 minutes); Financial News Network (an 18 hour per day network devoted strictly to matters of finance and economics); and certain foreign language channels (e.g. SIN) that provided programming directly from foreign countries (e.g. Mexico). (JA 67-68, 131-133) None of this type of "national" programming was generally available to viewers on wireless broadcast television stations (either of an independent or network affiliated type).

(e) *Cable Operators' Exercise of Editorial Discretion.* Since most systems in Arkansas, at the time of trial, were limited to 36 channels or less, and there were more than 100 separate satellite programming services available (PX 2, 3 and 9, JA 191-197 [R. 839]), each cable operator testified that they had to exercise editorial discretion, in the same manner as would a newspaper or magazine editor, in deciding what programming to make available to their subscribers. These cable operators testified that they previewed the available programming before choosing to put it on; that they were not

[2]The C-SPAN network happened to be in Little Rock, Arkansas, at the time of the evidentiary hearing on the Petitioners' Motion for Preliminary Injunction in August of 1987, providing 16 hours per day of live coverage, with the assistance and support of the local cable system operator, of the Southern Legislative Conference which was then being held in Little Rock, Arkansas. (JA 67-68)

required to carry any program and refused to carry some programming; and that they constantly changed programming to try and appeal to their subscribers' interest and to draw new subscribers. The MSO operators also testified that their programming was different on every individual cable system they operated in Arkansas. (JA 57, 63-64, 69, 75-77, 94-95, 117, 145-147, 151-152, 160-161)

(f) *Comparison of Cable Service with (1) Print and (2) Other Broadcast Services.* The Petitioners' witnesses testified that they considered their delivery of cable programming to be part of the mass communications media in Arkansas that was composed of both the electronic (cable, wireless broadcast radio and television, and satellite broadcast television) segments and the print (newspaper and magazine) segments. (JA 81-85, 100-101, 108, 115, 133-137, and 165-170) In fact, in the electronic segment of the mass communications media, the Petitioners' witnesses testified that cable operators provided a much greater variety of programming than did wireless broadcast television (JA 139-140), and that cable services provided virtually the same programming as was provided by "scrambled" satellite television broadcast services sent to a dish-antenna owner's backyard-earth station facility in return for a subscription fee. (JA 141, 147-150) The specific comparisons were as follows:

(i) *Print Segment Comparison.* The Petitioners' witnesses testified that they believed that cable programming provided (for a fee) news, information and entertainment that was the same or similar to that which was provided (for a fee) by the publishers of newspapers and magazines. Like the print media, these witnesses testified that they sometimes received complaints about programming from subscribers, but, like subscribers to newspapers or magazines, if a subscriber did not like part of the programming, the subscriber simply did not watch the objectionable programming, but continued to subscribe to the other programming offered (as opposed to cancelling the cable service). (JA 100-101) A direct comparison was made between the type of news, entertainment and

information communicated by cable programming and the type of news, entertainment and information deliveed by a general interest magazine such as the *Reader's Digest*. Like the *Reader's Digest* content, some of the cable programming was original, some was republished from other sources, and both communicators carried advertising. (PX 10 [R. 840], JA 134, 136, 168-169) Similarly, direct comparisons were made between the communications of protected speech by local newspapers and *USA Today* and CNN and the Headline News Networks; the news communicated by *Time* magazine and by *CNN;* the sports news conveyed by *Sports Illustrated* and by ESPN; and the information that was communicated by *People* magazine and a general interest network like the Lifetime Network, etc. (JA 81-84, 86, 100-101, 133-136, 139, 165, 168-170, 172-174) These witnesses generally characterized cable television's varied programming to be the presentation of an "electronic magazine."

(ii) *Electronic Segment Comparison.* The Petitioners' witnesses also testified that they, as cable operators, carried local broadcast television's signals on their systems (without a fee), and they also carried such wireless broadcast television signals to distant locations within the State of Arkansas where a broadcast signal would not have otherwise reached a viewer. The relationship between the local wireless broadcast television operator and the cable operator was characterized, by one of the Petitioners' witnesses, as being "symbiotic." (JA 79-80, 83-84, 136-137) With regard to "scrambled" satellite television broadcast, the Petitioners' witnesses testified that it was virtually the same programming that they secured from the same satellites and retransmitted over the cable facilities to their subscribers' converters. (JA 84-85, 141, 149-150) These witnesses also testified that between the time of the Preliminary Injunction hearing (August of 1987) and the time of trial (May 1988) in this case, that the number of satellite

networks that "scrambled" their satellite signals increased from 7 (PX 2, JA 191-192) to more than 50 (PX 9 [R. 839]).[3]

(g) *Statutory Scheme of Sales Tax.* The Arkansas tax administrators who were called as witnesses testified that cable television services had not been taxed before July 1, 1987, the effective date of Act 188 of 1987. Likewise, they testified that the subscription fees for "scrambled" satellite television services delivered in Arkansas were *not* subjected to tax after the adoption of Act 188. Further, they testified that the sale of magazines or books over the counter (but not by subscription), admission fees to movies and athletic events, and the rentals or sales of videotapes, as well as the sale of VCRs, radio sets, television sets and satellite dishes and decoders were all

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[3]Petitioners offered some testimony about how Arkansas and consumers would order and pay for these "scrambled" satellite services, for the purpose of establishing the discrimination in the taxing of similarly situated broadcast services. However, the Petitioners had no opportunity (or need at the trial level) to offer extensive evidence with regard to what they believe was the "futile" attempt by the Arkansas General Assembly to impose Arkansas' Sales Taxes upon these subscription fees charged for "satellite" subscription services, by the amendment of Ark. Code Ann. § 26-52-301(3)(D) by the adoption of Act 769 of 1989, since Act 769 was signed into law 11 days *after* the Chancellor rendered his written decision in the trial court. However, as appendices to their Petition for Rehearing before the Arkansas Supreme Court, the Petitioners attached the affidavits of (1) a "scrambled" satellite service subscriber, (2) a "scrambled" satellite service provider, and (3) a "scrambled" satellite service collecting agent within the State of Arkansas, to show that there was an evidentiary basis for the Arkansas Supreme Court *not* to approve prospectively the constitutionality of the Sales Tax statute (as amended by Act 769), as was done by the Arkansas Supreme Court below. Those three affidavits were attached as Appendices I, II and III to the Appellants' Petition for Rehearing, but they were ordered physically stricken by the Order of the Arkansas Supreme Court and are, therefore, not contained in the designated record in this case, though they were "proffered" or "tendered" for filing with the Clerk of the Arkansas Supreme Court. At the suggestion of the Clerk of this Court, the full Appellants' Petition for Rehearing, with Appendices I, II and III, has been "lodged" with the Clerk of this Court, for the convenience of the members of the Court if they deem it necessary to review such factual information for purposes of comparing the "scrambled" satellite television broadcast services to the Petitioners' cable television services provided in Arkansas.

subject to Arkansas' state and local Sales and Use Taxes. However, they testified that the sale of newspapers, or advertising in newspapers and on billboards, or the sale of magazines by subscription (whether printed within or without the State of Arkansas), the advertising sold by wireless broadcast radio and television services, and the sale of "scrambled" satellite subscription television services were *not* subjected to Arkansas' state and local Sales Taxes at the time of the trial in May of 1988. (JA 118-119, 120-123, 123-124, 141, 183-185)

These tax administrators also testified that the only reason for the extension of the imposition of the state's Sales Taxes to cable services by Act 188 of 1987 was for the purpose of raising general revenue and to broaden the Sales Tax base. (JA 124-125, 179-180) It was also established that the Arkansas General Assembly had twice, since the decision was rendered by this Court in the *Arkansas Writer's Project* case, had legislative bills introduced to repeal the exemption for magazines published in Arkansas of a specific content that was questioned in that case, and, in both instances, the Arkansas General Assembly had, by positive vote, defeated a measure that would have repealed this questioned exemption.[4]

Trial Court Opinion. This case was submitted to the Chancellor on this evidentiary record and the extensive post-trial briefs of the parties. In his decision, entered on March 10, 1989, the trial court Chancellor made specific Findings of Fact and Conclusions of Law. (App. D, p. 11a, Pet. for Cert. Dkt. No. 90-38) Therein, he found that cable television was entitled to claim the First Amendment protected rights of free speech and free press. The Chancellor drew many analogies between cable television and the print segments of the mass communications media, including the constant or continuing exercise of editorial discretion by cable operators in making programming decisions. The Chancellor also found that cable system

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[4]H.B. 1031, First Extraordinary Session, of 1987, and H.B. 1803 of 1989. (PX 7, JA 121-122 [R. 577-587, 649-652], and JA 197-200)

operators are cablecasting a retransmission of original works by others while some of the programming is actually originated by the cable television system operators or is programming specifically for cable television distribution. The Chancellor specifically found (App. D, p. 14a):

> 7. The "cable casting" of cable television operators provides Arkansans with a variety of programming which presents a mixture of news, information and entertainment. Programming seeks to provide a wide variety of topics and formats, including regular news and entertainment programming, public access channels, public announcements and electronic bulletin board.

The Chancellor also noted that the Petitioners' witnesses testified that they considered the totality of cable television programming to be the equivalent of an "electronic magazine." (App. D, p. 14a)

In his Conclusions of Law, the Chancellor specifically found (App. D, p. 17a):

> 2. Cable television operations are covered by the First Amendment to the Constitution of the United States. The First Amendment privileges apply to both the cable television system operators and cable television subscribers' right to receive cable programming.

After citing and quoting with approval from this Court's decision in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), the Chancellor proposed the question to be decided as:

> This Court must determine the extent of First Amendment protected rights of cable television. (App. D, p. 18a)

Thereafter, relying upon certain decisions by three United States Courts of Appeal, the Chancellor upheld the

constitutionality of Act 188's imposition of these Sales Taxes upon cable television services, principally because cable television was found to make a much greater utilization of the public right-of-ways than do businesses engaged in either (1) the ot electronic segments or (2) the print segments of the mass communications media. The Chancellor held that the raising of general revenues *was* a sufficiently compelling governmental interest to satisfy this Court's constitutional test for the incidental effect a tax may have upon First Amendment rights, and, therefore, he decided that the Petitioners' constitutional challenge to the Sales Taxes imposed by Act 188 of 1987 had failed.

On March 13, 1989, the Chancellor entered Judgment, dismissing the Petitioners' complaint, and releasing approximately $6.2 million of previously escrowed state and local Sales Taxes. (App. C, p. 9a, Pet. for Cert. Dkt. No. 90-38)

Amendment to Sales Tax Statute in 1989. On March 21, 1989, after the trial court's decision was rendered in this case, the Arkansas General Assembly adopted Act 769 of 1989 (App. H, p. 30a, Pet. for Cert. Dkt. No. 90-38) to amend the provisions of Act 188 of 1987 (which had by then been codified as Ark. Code Ann. § 26-52-301(3)(D) (App. E, p. 23a, Pet. for Cert. Dkt. No. 90-38). Act 769 of 1989 attempted to also extend the state and local Sales Taxes to certain charges made by out-of-state providers of "scrambled" satellite broadcast television subscription services that were supplied to Arkansas subscribers. However, Act 769 did not amend Arkansas' Compensating (Use) Tax statutes. Therefore, subscription fee charges for out-of-state providers of "scrambled" satellite television broadcast services to subscribers located in Arkansas, after July 1, 1987, are still not subject to Arkansas' Sales Taxes or Compensating (Use) Taxes when the fee is paid by the Arkansas subscriber directly to the out-of-state provider. Because of this 1989 amendment to the Arkansas Sales Tax law, the subscription fees for "scrambled" satellite services are subjected to Arkansas' Sales Taxes only when they are paid to an in-state "collecting agent" (e.g. a local cable

television operator or rural electric company) for the out-of-state "scrambled" satellite service provider.

Arkansas Supreme Court Opinion. On appeal to the Arkansas Supreme Court, the Petitioners requested that court to find that the statutory scheme of Sales Tax imposition on businesses engaged in the mass communications media, even after its amendment by Act 769 of 1989, unconstitutionally discriminated against the sale of cable television services, because these Sales Taxes were not imposed upon the sale of goods or services by other businesses engaged in both the electronic and print segments of the mass communications media in Arkansas. The Arkansas Supreme Court, in a decision entered on February 28, 1990 (App. B. p. 3a, Pet. for Cert. Dkt. No. 90-38), overturned the Pulaski County Chancery Court's decision and held that the imposition of the state and local Sales Taxes upon the proceeds from the sale of cable television services by Act 188 of 1987 was unconstitutional, because the discriminatory imposition of these excise taxes violated the First Amendment's rights of free speech and free press that belonged to the Petitioners. The state Supreme Court specifically rejected the public right-of-ways analogy exception, which had been proffered by the State of Arkansas and adopted by the trial court Chancellor, mainly because the Petitioners paid a municipal franchise (i.e. rental) fee for the use for these public right-of-ways, and, thus, the use of these right-of-ways by the cable operators bore no relation to the Sales Taxes in question.

However, the Arkansas Supreme Court did not delineate in its opinion what it considered were the First Amendment protected rights that did apply to cable television services. Instead, the Arkansas Supreme Court simply noted this Court's prior decision in *Preferred Communications, supra,* and approved, by reference, the discussion of such First Amendment rights by the District of Columbia Court of Appeals in *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434 (C.A.D.C., 1985), *cert. denied,* 476 U.S. 1169 (1986) (App. B, p. 6a). The Arkansas Supreme Court very briefly mentioned and

discussed four decisions by this Court dealing with the First Amendment protected provisions of free speech and free press, especially as they related to state taxation. The Court then held that the state and local Sales Taxes in Arkansas imposed upon charges for cable television services by Act 188 of 1987 were unconstitutional for the period from July 1, 1987, through June 30, 1989, because these excise taxes were discriminatorily applied between mass communicators delivering substantially the same services (i.e. cable television and "scrambled" satellite services).

However, the Arkansas Supreme Court specifically refused to compare cable television's First Amendment rights to those of businesses involved in the print segment of the mass communications media, because the Court stated that it had not been cited to any case where this Court had rendered a decision on such grounds. The Arkansas Supreme Court therefore refused to hold that the challenged Sales Taxes were unconstitutional for periods after the amendment to the Arkansas Sales Tax Act, effective July 1, 1989, by Act 769 of 1989, and, in effect, rendered an advisory opinion that the 1989 amendment had cured the constitutional infirmity that it had found in Arkansas' statutory scheme for imposing Sales Taxs.

Timely Petitions for Rehearing were filed on behalf of the State of Arkansas (arguing that the Arkansas General Assembly did not know about "scrambled" satellite services when Act 188 of 1987 was adopted) (JA 210-216) and by the Petitioners (arguing both the ineffectiveness of the 1989 amendment to the Sales Tax law and the refusal of the Arkansas Supreme Court to treat cable television services and the businesses engaged in the print segment of the mass communications media as being similarly situated taxpayers for purposes of applying this Court's First Amendment devised constitutional test, which test had then been applied by the highest appellate court of at least one other state). (JA 216-225) Both of these Petitions for Rehearing were denied by the Arkansas Supreme Court's Order of April 2, 1989. (App. A, p. 1a, Pet. for Cert. Dkt. No. 90-38)

Petitions for Certiorari. Both the Arkansas Revenue Commissioner and the representative Petitioners of the certified class of Arkansas taxpayers and cable television operators filed separate Petitions for Certiorari with this Court on July 2, 1990, and both petitions were granted and these causes were consolidated for purposes of briefing and argument by this Court's Order of October 1, 1990. (JA 226)

SUMMARY OF THE ARGUMENT

Initially, it is important to note what the questions presented in this case are and what they are not. The questions presented here are ones of state taxation, and the application of First Amendment principles is solely for the purpose of determining whether the providers of cable television services are treated differently (for Sales Tax purposes) that Arkansas treats similarly situated businesses that are communicators and speakers in both the electronic and print segments of this mass communications media. This is *not* a case that presents questions or disputes over prior restraint on speech, access to cable facilities, franchising of cable systems, or regulation of the content or nature of the programming utilized in this cable television segment of the mass communications media.

This case simply presents the vehicle for this Court to answer the question it reserved in the case of *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 421, 107 S.Ct. 1722 (1987), at 1729, to wit:

> [W]e need not decide whether a distinction between different types of periodicals [media] presents an *additional basis for invalidating the Sales Tax, as applied to the press.* (Emphasis Added)

The majority of the lower federal appellate courts and the highest appellate courts of the States of Oklahoma and New York have, in implementing the rationale of this Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983), answered that question in the affirmative. These courts have held that, unless there is some logical reason for distinguishing beween the different segments of the mass communications media, cable television services should enjoy the same broad First Amendment rights traditionally afforded those businesses involved in the print segment of this mass communications media.

The Arkansas Supreme Court, in its decision in this case, erroneously declined to broadly apply this First Amendment test to determine if the challenged Sales Taxes are applied discriminatorily upon the sales of cable services. The Arkansas court based its decision upon its statement that no decision of this Court has been rendered that requires businesses in the print and electronic segments of the mass communications media to be treated and taxed the same. (785 S.W.2d, at 204)

The Petitioners submit that the proper application of this Court's "balancing of interest" test (where a state tax is imposed discriminatorily upon businesses involved in the electronic and print segments of the mass communications media, thus causing an incidental infringement upon the taxpayers' First Amendment rights) was stated by the Oklahoma Supreme Court in its decision in *Oklahoma Broadcasters Association, Inc. v. Oklahoma Tax Commission*, 789 P.2d 1312 (Ok., 1990) and the New York Court of Appeals in its adoption of that state's intermediate appellate court's decision in the case of *McGraw-Hill, Inc. v. State Tax Commission*, 252 N.E.2d 163 (N.Y., 1990), *adopting* 541 N.Y.S.2d 252 (App. Div. 3 Dept., 1989).

The Petitioners submit that this Court should reverse the portion of the Arkansas Supreme Court's opinion below that found the 1989 amendment to Arkansas Sales Tax statutes had cured the constitutional infirmity that had previously been found by that court to exist in Arkansas' statutory scheme of Sales Taxes. This Court should mandate that this broader test for measuring discrimination among businesses engaged in the mass communications media must be applied in determining whether businesses involved in both the electronic and print segments of the mass communications media are similarly situated and are similarly taxed.

Therefore, the Petitioners submit that this Court should use the evidentiary record established in this case to affirmatively answer the question the Court reserved in the

Arkansas Writer's Project case and find that, for periods after the 1989 amendment to the Arkansas Sales Tax law, the constitutionally prohibited discrimination in Arkansas' taxation of the sales of cable services has continued.

ARGUMENT

CABLE TELEVISION SERVICE PROVIDERS SHOULD BE DETERMINED TO HAVE THE SAME FIRST AMENDMENT PROTECTED RIGHTS OF FREE SPEECH AND FREE PRESS AS DO BUSINESSES INVOLVED IN THE SALE OF GOODS AND SERVICES IN THE PRINT SEGMENT OF THE MASS COMMUNICATIONS MEDIA FOR PURPOSES OF DETERMINING WHETHER A STATE TAX IS BEING DISCRIMINATORILY IMPOSED UPON SALES OF GOODS OR SERVICES BY ONE ENTITY AND NOT THE OTHER.

The Arkansas Supreme Court properly found that Arkansas' statutory scheme for imposing Sales Taxes unconstitutionally discriminated against the sale of cable television services during the period from July 1, 1987, through June 30, 1989. In rendering this decision, the Arkansas court applied the First Amendment based test announced in this Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983), which test was further implemented by the Court's decisions in the cases of *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 421 (1987) and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).[5]

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[5]The Petitioners submit that the Arkansas Supreme Court's application of this Court's First Amendment based test to the undisputed facts established by the evidentiary record in this case was too narrow and restrictive in light of the purpose for this test, i.e. to protect similarly situated speakers from government action. In *Texas Monthly* this Court struck down a statutory scheme for imposing Texas' Sales Taxes that allowed only one (1) exemption, i.e. for religious publications. In implementing this Court's test in a magazine publisher's First Amendment based challenge to Oklahoma's Sales Tax scheme, the Oklahoma Supreme Court rejected the Oklahoma Tax Commission's plea for the adoption of a "restrictive" or "narrow" application of this First Amendment test (as was adopted by the Arkansas Supreme Court in this case) by stating:

> [W]e find that the Court announced constitutional standards are meant for broad and general application to the press.

Dow Jones & Co. v. Oklahoma Tax Commission, 787 P.2d 843, at 846 (Ok., 1990)

However, for periods after July 1, 1989,[6] the Arkansas court refused to broadly apply the rationale of this First Amendment based test, to even compare cable services to the services and goods sold by businesses engaged in the print segment of the mass communications media. Therefore, under this restrictive application of the *Minneapolis Star* test, the Arkansas Court specifically refused to find that cable television operators were similarly situated to other businesses involved in the sale of goods or services in the electronic and print segments of the mass communications media in Arkansas for purposes of determining whether or not Arkansas' Sales Taxes continued to be discriminatorily imposed, after the 1989 amendment to the Sales Tax law. It is this "narrow" application of the *Minneapolis Star* test by the Arkansas Supreme Court that has been questioned by the Petitioners in Docket No. 90-38.

a. *Purpose for the Minnespolis Star Test*

This Court specifically announced in both its *Minneapolis Star* and *Arkansas Writer's* decisions that the reason for the adoption of this First Amendment based test was to determine whether similarly situated First Amendment protected speakers were being taxed differently, so as to question even the threat of a censorial action by the government on their rights of free speech and free press. If this situation was found to exist, then the Court presumed that the reason for the differential tax treatment was "not unrelated to the suppression of expression." *Minneapolis Star, supra*, 460 U.S. at 585.

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[6]The effective date upon which Act 769 of 1989 attempted to extend Arkansas' state and local Sales Taxes to charges made not only for cable television service, but also charges made for "scrambled" satellite television broadcast services. As explained, *infra*, ftnt. 17, the Petitioners believe this attempt to impose Arkansas' Sales Tax on charges for these "scrambled" satellite broadcast television services was ineffective and illusory.

Therefore, once the challenging taxpayer has evidentiarily established the existence of this differential taxation among or between members of the press (*Arkansas Writer's*, 107 S.Ct. at 1729),[7] then the burden of proof shifts from the taxpayer to the taxing authority to establish a "compelling" governmental interest that is being served by this differential taxation.[8] This is a heavy burden placed upon the taxing authority,[9] and the mere raising of general revenues has consistently been held *not* to be an adequate "compelling" governmental interest that will overcome this incidental infringement upon the mass communicators' First Amendment protected rights of free speech and free press.[10]

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[7]Though this Court held in *Minneapolis Star* that the challenging taxpayer did not have to show a "censorial" intent on the part of the General Assembly in passing the challenged Sales Tax, the Petitioners must note that, in the nearly four years since the *Arkansas Writer's Project* decision was rendered, the Arkansas General Assembly has, on two occasions, taken a positive vote *not* to repeal the exemption that was questioned in the *Arkansas Writer's Project* case, see footnote 4, *supra*. Indeed, the tax administrators in Arkansas have themselves broadened the discrimination against cable television by issuing Revenue Policy Statements 1988-1 and 1988-3 (PX 12 and PX 13, JA 200-202) that have removed Arkansas' Compensating (Use) Tax from subscription fee for magazines printed by out-of-state publishers and sold in Arkansas. Thus, in Arkansas, the admonitions of this Court's teachings in *Minneapolis Star* and *Arkansas Writer's Project* have generally been ignored by the Arkansas General Assembly.

[8]This "balancing of interests" test for First Amendment purposes was adopted by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968) and made applicable to this question of state taxation by its adoption in *Minneapolis Star*, 460 U.S. at 585.

[9]See, *Minneapolis Star*, *supra*, 460 U.S. at 592-593; *Arkansas Writer's Project*, 107 S.Ct. at 1730.

The Petitioners submit that the Arkansas Supreme Court failed to even begin to apply the proper *Minneapolis Star* analysis in this case, because it refused to even compare cable services with the goods and services furnished by the print media. The only reason given by the Arkansas court for failing to apply this *Minneapolis Star* test to Arkansas' Sales Tax scheme (as amended in 1989) was because that court found no decision of this Court that had made a comparison of businesses involved in the electronic segment of the mass communications media, with businesses involved in the print segment of the media. (785 S.W.2d at 204)

The evidentiary record in this case clearly establishes that cable operators disseminate to their subscribers the same type of communications or messages as do the publishers of newspapers and magazines, as well as do the operators of wireless broadcast television and radio and "scrambled" satellite broadcast television services. In the last 20 years cable television has experienced explosive growth and is now the normal or major source for news, information and entertainment in more than 50% of all of the homes in the United States. With the dramatic drop in newspaper readership among citizens under 35 years of age, this cable medium of communication may well become even more the accepted source for news, information and entertainment in the next 20 years. Therefore, it seems illogical for any court to allow this segment of the mass communications media to be threatened by differential taxation by the states, just when it

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[10]The Petitioners acknowledge that, as First Amendment protected speakers, cable television operators (like their brethren who are engaged in businesses in the other electronic and print segments of the mass communications media) are not exempted from paying taxes of general application, *Minneapolis Star* 460 U.S. at 581-582. In fact, the record reflects that cable operators in Arkansas pay generally applicable state income taxes, property taxes, and sales and use taxes imposed upon their taxable purchase. (JA 91-92) The sale of cable services have been singled out by Arkansas to be subjected to the state's Sales Taxes, from among the sales of goods or services by similarly situated First Amendment protected communicators in the mass communications media, it is this action that the Petitioners complain about in this appeal.

appears that cable television is to be on the threshold of becoming one of the pervasive mediums for public communication in this country.[11]

b. *First Amendment Comparison and Analysis*

This Court has already determined that the activities engaged in by cable television service providers in communicating news, informtion and entertainment to cable subscriber-customers are activities that are entitled to claim, and be protected by, the First Amendment's guarantee of free speech and free press. In the case of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), at 494, Chief Justice Rehnquist stated:

> We do think that the activities in which Respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges:
>
> > "The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of that available space to reprint (or retransmit) the communications of others, while at the same time providing some original content." App. 3a
>
> Thus, through original programming or by exercising editorial discretion over which stations or programs to

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[11]The Petitioners submit that not only is the context of cable television's communications similar to that of magazine and newspaper publishers, they also point out that the form of the sale of their service is similar to that of the print media. Both of the separate segments of the mass communications media sell their products in return for a periodic subscription fee and both are partially supported by the sale of advertising. In fact, the Petitioners maintain that cable television service is really more analogous to the products sold by the print segment of the mass communications media, than it is to the business engaged in by wireless broadcast television. See, *Quincy Cable TV, Inc. v. FCC*, 769 F.2d 1434, at 1450 (C.A.D.C., 1985), *cert. denied*, 476 U.S. 1169 (1986).

> include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted that cable operators exercise "a significant amount of editorial discretion regarding what their program will include." . . . Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspapers and book publishers, public speakers and pamphleteers. (Citations Omitted)

The Petitioners have attempted to take these statements of principle as a guide for their pleadings (Second Amended Complaint, ¶ ¶ 17-19, JA 12) and their proof in this case. They believe that the evidence that they have introduced into the record in this case overwhelmingly establishes that cable television services in Arkansas partake of enough of the aspects or characteristics of speech and communication traditionally associated with the publication of newspapers and magazines to cause cable television to be considered as being similarly situated to these businesses engaged in the print media (for purposes of applying the *Minneapolis Star* test). Accordingly, the Petitioners submit that cable television services should be equated and compared to these more traditional mass communicators in the print segment of the mass communications media for purposes of measuring whether Arkansas' statutory scheme for imposing its Sales Taxes meets First Amendment constitutional muster.

Both before and after this Court recognized that cable television could claim the First Amendment rights of free speech and free press, the majority of the federal district and appellate courts that have examined the extent of cable's First Amendment rights have generally held that (unless there is some logical reason to impose a restriction upon these rights of free speech and free press), these First Amendment protected rights would be as broadly construed for cable operators, as

they had previously been construed for the more traditional print segment of the mass communications media.[12]

In its opinion below, the Arkansas Supreme Court referenced the opinion by the District of Columbia Court of Appeals in the *Quincy Cable TV, Inc., supra*, as a decision that set forth a good discussion of the history of the development of cable television.[13] After a thorough and detailed analysis of the First Amendment rights accorded to various segments of the mass communications media, the appellate court in *Quincy Cable TV* held (758 F.2d at 1450):

> While *Miami Herald* involved the conventional press, as this Court has had prior occasion to observe, there is no meaningful distinction between cable television and the newspapers on this point. *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 46.
>
> Indeed, once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic entity for purposes of the First Amendment, the analogy to more traditional media is compelling . . . .

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[12]See, *HBO v. FCC*, 567 F.2d 29 (C.A.D.C., 1977), *cert. denied*, 434 U.S. 839 (1977); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (C.A.D.C., 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (C.A.D.C., 1987), *cert. denied*, 108 S.Ct. 2014 (1988); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (C.A.6, 1985), *affirmed and remanded*, 476 U.S. 488 (1986); *Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559 (N.D. Cal., 1968); and *Group W Cable, Inc. v. City of Santa Cruz*, 669 F.Supp. 954 (N.D. Cal., 1987).

[13]See also, Parsons, *Cable Television and the First Amendment*, Chapter 2, Lexington Books (1987); Shapiro, Kurland & Mercurio, *Cablespeech: The Case for First Amendment Protection*, Law & Business, Inc. (1983); Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U.L.Rev. 133 (1976) and Note, *Cable Television: A New Challenge for the "Old" First Amendment*, 60 St. John's L. Rev. 114 (1985). This last Note contains an extremely comprehensive and thoughtful analysis of the underlying issue presented here regarding the comparison of cable television to other members of the mass communications media for First Amendment purposes.

Since there is no electro-magnet spectrum limitation upon cable television's ability to deliver news, information and entertainment, as there is with the delivery of these communications by wireless broadcast television and radio services. Thus, the "compelling" interest that this Court found was served (in regulating the First Amendment rights of wireless broadcast radio and television to be somewhat less than those traditionally accorded the print media) is simply not present in this case.[14]

c. *Proper application of the Minneapolis Star test.*

As noted above, the Petitioners submit that the Arkansas Supreme Court, below, erroneously and too restrictively, applied this Court's First Amendment based test it mandated in *Minneapolis Star* for purposes of comparing the tax treatment given to similarly situated members of the press. That court refused to compare the electronic and print segments of the mass communications media for purposes of testing the discriminatory aspects of Arkansas' statutory scheme for imposing its Sales Taxes. The Petitioners submit that the broader application of this Court's rationale, as adopted by the Oklahoma Supreme Court in *Oklahoma Broadcasters Association, Inc. v. Oklahoma Tax Commission*, 789 P.2d 312 (Ok., 1990) and the New York Court of Appeals in *McGraw-Hill, Inc. v. State Tax Commission*, 341 N.Y.S.2d 252 (App. Div. 3 Dept., 1989) *affirmed and adopted*, 252 N.E.2d 163 (N.Y. 1990), should have been utilized by the Arkansas Supreme

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[14]See, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Cable television's technological ability to deliver more messages and communications has increased from 10 or 12 channels in the 1950's, to where the standard cable systems in Arkansas now have some 36 or more channels. In the next 10 years, both cable television and direct broadcast satellite (DBS) services will be able to provide 100 or more channels per receiver. Therefore, the Petitioners submit that there is no reason for this Court to approve the Arkansas Supreme Court's failure to recognize this technological revolution in our method of mass communications by refusing to even compare cable television to businesses engaged in the more traditional print segment of the mass communications media.

Court, to measure the discrimination that might exist in Arkansas' statutory scheme for imposing its Sales Taxes.

In *Oklahoma Broadcasters Association*, in analyzing the question of the differences that might rise between the First Amendment rights of those businesses involved in the electronic segment of the mass communications media, as opposed to those businesses involved in the print segment of the mass communications media (for purposes of the state's statutory Sales Tax scheme), the Oklahoma Supreme Court held (in discussing this Court's *Minneapolis Star* and *Arkansas Writer's Project* cases (789 P.2d at 1316):

> Though both *cases* admittedly deal with differential treatment among members of the *print media*, there is nothing to suggest that this Court should, without sufficient justification, accrue preferential treatment of the print media over the broadcast media, where both are members of the press. The First Amendment guarantees freedom of the press—not just the *printed* press.
>
> These exemptions have resulted in differential treatment that are, therefore, subject to constitutional review. *The test is whether the state can justify such differential treatment with a "counter" balancing interest of compelling importance that it cannot achieve without differential taxation.* (Emphasis Added)

Likewise, in the differential treatment of advertising income for purposes of computing New York state's corporate franchise taxes, the intermediate New York Appellate Court held (541 N.Y.S.2d at 255):

> Given that there was differential treatment between the print media and the broadcast media in this case, it is incumbent upon Respondent to show 20 N.Y.S.C.R.R. 4-4.3(f)(2) was necessary to serve a compelling State interest. This in our view it did not do. Respondent claims that the unique nature of the electronic media makes it more susceptible to

> governmental regulation and that there are many differences between the print and visual media. *While this may be true, such an argument fails to show any compelling state interest in taxing the two types of media differently.* Thus, the regulation must fall . . . . To conclude, we find, the regulation at issue is unconstitutional under the 1st Amendment and grant the petition. (Emphasis Added)

Therefore, among the state appellate courts that have considered the application of the *Minneapolis Star* rationale in instances involving a discriminatory scheme of taxation between businesses involved in the electronic segment and businesses involved in the print segment of the mass communications media, the Arkansas Supreme Court's decision in this case is the *only* one that has narrowly limited the scope of the First Amendment protection afforded similarly situated mass communicators by refusing to find that the electronic speaker is similarly situated to the print speaker.[15] Thus, the Arkansas Supreme Court never even put the state to its burden of proof under the "balancing of interests" test in this case. This action was clearly erroneous and should be reversed by this Court's decision in this case.

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[15]The highest or intermediate appellate courts of a number of other states have more broadly applied the First Amendment based standards set down by this Court's *Minneapolis Star* and *Arkansas Writer's Project* cases. Some of these decisions have declared that gross receipts based taxes imposed upon magazines, but not newspapers, to be unconstitutional. See, *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (La. App. 1st Div., 1987); *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tn. 1990), *cert. pending*, Docket No. 90-273; *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251 (Tn. 1990), *cert. pending*, Docket No. 90-273; *Dow Jones & Co. v. Oklahoma Tax Commission*, 787 P.2d 843 (Ok., 1990); *Hearst Corporation v. Dept. of Revenue*, 779 S.W.2d 557 (Mo., 1989); *Dept. of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d 1304 (Fla., 1990); Cf. *Hearst Corp. v. Iowa Dept. of Revenue and Finance*, ____ N.W.2d ____, 1990 WL 135941 (Ia., Sept. 19, 1990). Also, in the comparison of similarly situated businesses within the electronic segment of the mass communications media, the courts have consistently held for the taxpayer where the gross receipts based taxes were discriminatorily imposed against the First Amendment protected speaker-taxpayers. See, *City of Alameda v. Premier Communication Network, Inc.*, 202 Cal. Rept. 684 (Cal. App. 1 Dist., 1984), *cert. denied*, 469 U.S. 1073 (1984), and *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988).

d. *The facts in this case establish that cable television services are similarly situated to goods or services provided by other businesses involved in the electronic and print segments of the mass communications media.*

As noted above, this Court held in the *Preferred Communications* case (460 U.S. at 494) that "cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers . . . ." The evidentiary record established by the Petitioners in this case (as discussed more fully above in the Statement of the Case) clearly proves that cable television operators in Arkansas are providing the same type of news, information and entertainment to their subscribers (over a coaxial cable), as are the operators of wireless broadcast radio and television businesses, "scrambled" satellite subscription services, and, more importantly, the publishers of newspapers and magazines. This is why the trial court Chancellor noted that the Petitioners' witnesses had referred to cable television programming as an "electronic magazine."

In fact, the Petitioners submit that the Arkansas taxing authorities have not even raised any question but that the content of the news, information and entertainment being conveyed by Arkansas cablecasters is the same type of communication that is being conveyed by publishers engaged in the print segment of the mass communications media. Instead, the *only* premises for the state's defense in this case have been that cable television makes greater use of the public right-of-ways and that the Arkansas General Assembly allegedly lacked knowledge of the existence of "scrambled" broadcast television services when it adopted Act 188 of 1987. The state has alleged that cable's greater use of the public right-of-ways caused cable to be more susceptible to regulation than other businesses involved in the print segment of the mass communications media and therefore absolved the Arkansas General Assembly from establishing a nondiscriminatory Sales Tax scheme for imposing these state and local Sales Taxes upon the proceeds received from the sale of cable television services.

The Petitioners submit that the Arkansas Supreme Court correctly rejected the Revenue Division's argument, based upon the greater use of the public right-of-ways, by finding that the cable companies paid a franchise fee for the "rental" of the public right-of-ways and, in any event, that the use of these public right-of-ways by the cable operators had nothing to do with the comparison of cable services and those of other mass communicators for purposes of imposing Arkansas' Sales Taxes.

The state's argument that the Arkansas General Assembly had no knowledge of the existence of "scrambled" satellite broadcast television subscription services is without merit, because it has no factual or legal basis in the record in this case. The Petitioners' *original* Complaint (filed in late May of 1987) raised the issue of the discrimination that existed between the taxing of cable services and "scrambled" satellite television services and the Arkansas General Assembly met at least four (4) times thereafter in special session (before Act 769 of 1989 was adopted) and this issue was never broached by the Arkansas Legislature.[16]

The trial court's analysis of cable television's First Amendment rights, as compared to those of other businesses engaged in electronic and print segments of the mass communications media in Arkansas, was much more detailed than that of the Arkansas Supreme Court. The evidentiary record established in this case supports the Chancellor's findings that there is a very close relationship between the content of cable television's programming and the communications made to subscribers by the publishers of magazines and newspapers to their subscribers. There is cross or common ownership of cable and print speakers and there are instances in which these owners jointly market the services of both their print and cable businesses. That is why these electronic and print media businesses were said to have a "symbiotic" relationship.

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[16]See the Appellants' Response to the Appellees' Petition for Rehearing filed with the Arkansas Supreme Court below.

Though there may be differences between the First Amendment rights of cable television communicators and print communicators for purposes of regulation, access or delivery of services, etc., there is absolutely no logical reason to differentiate between these two segments of the mass communications media for purposes of imposing state and local Sales Taxes. Thus, as this Court noted in *Arkansas Writer's Project* (107 S.Ct. 1728), "a tax that differentiates between members of the press" [media] cannot be justified because it is needed to raise general revenue.

This raising of general revenues is the only reason given in this record by the Arkansas tax administrators for imposing these state and local Sales Taxes upon the Petitioners' cable television services. This particular justification has consistently been rejected by this Court as not being a sufficiently "compelling" governmental interest to justify the discriminatory imposition of an otherwise general Sales Tax among similarly situated members of the mass communications media. *Arkansas Writer's Project*, 107 S.Ct., at 1728-30. Accordingly, the Petitioners submit that the State of Arkansas has "defaulted" on its obligation to establish, under the *O'Brien* "balancing of interests" test, a "compelling" governmental interest that is still being served by the continued (post Act 769 of 1989) discriminatory imposition of Arkansas' Sales Taxes upon charges made for cable television subscription services.

Even after the Arkansas General Assembly's amendment of Ark. Code Ann. § 26-52-301(3)(D) by Act 769 of 1989 (effective July 1, 1989), Arkansas' statutory scheme for imposing its state and local Sales Taxes still does not impose these excise taxes upon the gross proceeds received from (1) the sales of newspapers; (2) the sales of magazines by subscription; (3) the sale of advertising to support broadcast radio and television services; (4) the sale of advertising in newspapers and on billboards; and (5) the sale of 80% or more of the "scrambled"

satellite television broadcast services sold by subscription in Arkansas.[17]

Therefore, the Petitioners submit that this Court should take this opportunity to affirmatively answer the question it reserved in its *Arkansas Writer's Project* case,[18] regarding whether the differential taxation of different types or mediums of expression in the mass communications media presents an additional basis for invalidating the Sales Taxes imposed upon the press, by reversing the Arkansas Supreme Court's decision in this case (for periods after July 1, 1989). It is clear that Arkansas still discriminatorily imposes its state and local Sales Taxes upon the cable television segment of the press, but not upon most all other similarly situated businesses involved in the electronic or print segments of the press [mass communications media] operating in Arkansas.

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[17]Based upon the "advisory" nature of the Arkansas Supreme Court's prospective approval of the amendment to the Arkansas Sales Tax law by Act 769 of 1989, without the challenging taxpayers being allowed to attack such amendment to the Sales Tax law so as to try and evidentiarily show that the discriminatory imposition of the Sales Taxes has continued (see the Appendices I, II and III of the Appellants' Petitions for Rehearing filed in the Arkansas Supreme Court), then, even if this Court should somehow find that the narrow application of this Court's First Amendment standards applied by the court below was the correct one, the decision of the Arkansas Supreme Court should nonetheless be modified, with regard to its approval of the 1989 amendment to the Sales Tax law. This Court should allow these challenging taxpayers and cable operators to be able to evidentiarily attack such amended statute, on remand, in this case, or in a separate action, without there being a claim of collateral estoppel on the part of the State of Arkansas. This situation now exists because of the "advisory" opinion rendered by the Arkansas Supreme Court that constitutionally approved this 1989 amendment without their being an evidentiary record upon which such decision could be based.

[18]107 S.Ct. at 1729.

CONCLUSION

For the numerous reasons set forth above, the representatives of this class of taxpayers and cable operators respectfully submit that this Court (1) should render a decision overturning the part of the Arkansas Supreme Court's decision that narrowly applied the First Amendment test announced by this Court in its *Minneapolis Star* decision, and (2) should declare that Arkansas' statutory scheme for imposing the challenged Sales Taxes (even after the statute's 1989 amendment) is still unconstitutional because it imposes these state and local Sales Taxes upon the sale of cable television services and not upon the sales by other similarly situated businesses engaged in both the electronic and print segments of the mass communications media in Arkansas.

Respectfully submitted,

November 15, 1990

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FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JAMES C. FLETCHER
PETITIONER
v.
DANIEL L. REDDICK, et al.
RESPONDENTS
and
DANIEL L. REDDICK, et al.
PETITIONERS
v.
JAMES C. FLETCHER
PETITIONER

CONSOLIDATED CASES

On Writ of Certiorari to the Arkansas Supreme Court

BRIEF FOR RESPONDENTS IN DOCKET NO. 94-28

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PEGASUS PRINTING & STATIONERY COMPANY, INC.

BEST AVAILABLE COPY

QUESTION PRESENTED

Was the imposition of Arkansas' state and local Sales Taxes on charges made for cable television services unconstitutional, during the period from July 1, 1987, through June 30, 1989, in the face of the Respondents' First Amendment based challenge, because such excise taxes were not also imposed (1) upon subscription fees charged by program providers for supplying "scrambled" satellite television broadcast services or (2) upon charges made for the sale of other goods or services by similarly situated businesses in Arkansas that were involved in the mass communications media?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner James C. Pledger is the former Commissioner of Revenues of the Revenue Division of the Arkansas Department of Finance and Administration and the person who is charged by statute with administering the state and local Sales Taxes imposed in Arkansas.

Respondents here are cable television operators and subscribers who are representatives of a certified class of taxpayers that are subjected to the state and local Sales Taxes imposed by Act 188 of 1987, before amended by Act 769 of 1989, and include the following named Plaintiffs:

Respondent Daniel L. Medlock is an individual, a subscriber to cable television services, and a resident of Little Rock, Pulaski County, Arkansas.

Respondent Community Communications Company is an independent corporation that has no subsidiaries or affiliates, and which operates six cable television franchises in south and southeast Arkansas.

Respondent Arkansas Cable Television Association, Inc. (ACTA) is an independent not-for-profit corporation that has no subsidiaries or affiliates, and is a trade organization composed of the operators of approximately 80 cable television systems in Arkansas.

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Nos. 90-29, 90-38

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES C. PLEDGER
PETITIONER
v.
DANIEL L. MEDLOCK, et. al.
RESPONDENTS
and
DANIEL L. MEDLOCK, et. al.
PETITIONERS
v.
JAMES C. PLEDGER
PETITIONER

CONSOLIDATED CASES

On Writ of Certiorari to the Arkansas Supreme Court

BRIEF FOR RESPONDENTS IN DOCKET NO. 90-29

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (App. B, p. 3a, Petition in Docket No. 90-38) is reported at 301 Ark. 483, 785 S.W.2d 202. The Order of the Supreme Court of Arkansas denying the Petitions for Rehearing is unreported (App. A, p. 1a, Petition in Docket No. 90-38).

The Opinion (App. D, p. 11a, Petition in Docket No. 90-38) and the Order and Judgment (App. C, p. 9a, Petition in Docket No. 90-38) of Chancellor Lee A. Munson of the Pulaski County Chancery Court are unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. B, p. 3a, Petition in Docket No. 90-38) was rendered on February 28, 1990, and timely filed Petitions for Rehearing by both the Petitioners and the Respondents were filed and denied on April 2, 1990 (App. A, p. 1a, Petition in Docket No. 90-38). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

U.S. Constitution:

Amendment 1. Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Statutes:

Act 188 of 1987 (in effect from July 1, 1987, through June 30, 1989), Ark. Code Ann. § 26-52-301(3)(D), is set forth in its entirety in the Petition in Docket No. 90-38 (App. E, pp. 23a-25a).

STATEMENT OF THE CASE

The Respondents have filed their own separate Petitioners' Brief on the Merits in the action styled *Medlock v. Pledger*, Docket No. 90-38, which action has been consolidated with this one for purposes of briefing and oral argument. The Respondents here (Petitioners in Docket No. 90-38) have set forth in their separate Petitioners' Brief on the Merits in Docket No. 90-38 an extensive Statement of the Case, which statement is substantially more detailed than the Statement of the Case set forth by Petitioner Pledger in his brief filed in this proceeding (Docket No. 90-29).

Therefore, rather than simply republishing such Statement of the Case in this brief, the Respondents here adopt by reference their Statement of the Case, as set forth in their own separate Petitioners' Brief on the Merits in Docket No. 90-38.

SUMMARY OF THE ARGUMENT

The Arkansas Supreme Court decided that the imposition of Arkansas' state and local Sales Taxes upon charges for cable television service (by the adoption of Act 188 of 1987) was unconstitutional for periods from July 1, 1987, through June 30, 1989. However, upon the amendment of Act 188 of 1987 by Act 769 of 1989 (effective July 1, 1989), the Arkansas Supreme Court prospectively approved the constitutionality of the amended statute, in response to the cable operators' and taxpayers' First Amendment based challenge to the State's statutory scheme for imposing Sales Taxes upon businesses involved in the print and electronic segments of the mass communications media in Arkansas.

The cable operators and taxpayers submit that this Court should reject the State of Arkansas' attempt to overturn that portion of the Arkansas Supreme Court's decision that held these Sales Taxes were unconstitutionally imposed upon charges for cable television service for the initial two year period of their existence.

The cable operators and taxpayers submit that the Petitioners' argument that cable television's greater utilization of the public rights-of-way in providing its programming services, as compared to the use of such public rights-of-way by other businesses involved in both the electronic and print segments of the mass communications media in Arkansas, is illogical. This argument does not provide the necessary *compelling* governmental interest that would justify what is otherwise an admittedly discriminatory imposition of Arkansas' state and local Sales Taxes upon charges for cable television service. Therefore, this argument should be rejected by this Court for the same reasons this argument was rejected by the Arkansas Supreme Court below. Governmental economic regulation does *not* provide a basis for

discriminatory governmental taxation and the cable industry's greater use of the public's rights-of-way provides absolutely no basis for the State of Arkansas to discriminatorily impose its otherwise general Sales Tax upon charges for cable television service.

The State of Arkansas' assertion that Arkansas' General Assembly did not intend to discriminatorily impose Arkansas' Sales Taxes upon charges for cable television service because the members of the legislative body were *not* aware of the existence of "scrambled" satellite television broadcast subscription services, and that such discriminatory imposition of the Sales Taxes was eliminated at the first practical occasion, has absolutely no basis in either the evidentiary record in this case or in any legal theory adopted by this Court or any of the highest appellate courts of any of Arkansas' sister states.

ARGUMENTS

I. THE GREATER USE OF THE PUBLIC RIGHTS-OF-WAY BY CABLE TELEVISION DOES NOT ESTABLISH A COMPELLING GOVERNMENTAL INTEREST THAT WILL JUSTIFY THE DISCRIMINATORY IMPOSITION OF ARKANSAS' STATE AND LOCAL SALES TAXES BY ACT 188 OF 1987.

For the two year period from July 1, 1987, through June 30, 1989, [1]Act 188 of 1987 imposed Arkansas' state and local Sales Taxes upon charges for cable television service. However, Arkansas' statutory scheme for imposing Sales Taxes during this same period did not subject the sales of newspapers, magazines by subscription, advertising to sponsor wireless radio and television broadcasts or of "scrambled" satellite broadcast television services to these same state and local Sales Taxes.

In their First Amendment based challenge in this case, the cable operators and their taxpayer-subscribers alleged that their First Amendment rights of free speech and free press were being discriminatorily taxed, in violation of the rationale announced by this Court in its decisions in the cases of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983) and *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987). The cable operators and taxpayers maintain that this discrimination existed in Arkansas' statutory Sales Tax scheme, whether the comparison was made between businesses involved in both the electronic and print segments of the mass communications media (the broader view) or simply between businesses that

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[1]Before the amendment of Act 188 of 1987 by the Arkansas General Assembly's adoption of Act 769 of 1989 (effective July 1, 1989), Arkansas' state and local Sales Taxes were imposed upon charges for cable television services, but virtually upon no other sale of goods or services by other businesses involved in either the electronic or print segments of the mass communications media in Arkansas.

operated within only the electronic segment of the mass communications media (the narrower view).

The State of Arkansas admits on brief (Pet. Br. p. 15) that such discriminatory imposition of Arkansas' state and local Sales Taxes actually existed during this two (2) year period of time. However, the state argues that there were two compelling governmental interests being served by this method of imposing these excise taxes that justified the infringement upon the taxpayers' First Amendment protected rights of "free speech" and "free press."

The Arkansas Revenue Division successfully argued in the trial court that the discriminatory imposition of the state and local Sales Taxes by Act 188 of 1987 could be justified because cable television makes a greater use of the public rights-of-way and causes a greater disruption of public order in providing its programming services than do other businesses involved in either the electronic or print segments of the mass communications media. The Arkansas Revenue Division and the trial court chancellor relied upon dicta set out in three decisions of various federal circuit courts,[2] as support for the proposition that cable television can be regulated *and* taxed differently than other similarly situated businesses involved in the mass communications media in Arkansas.

The Arkansas Supreme Court had no problem in rejecting this faulty reasoning of the Arkansas Revenue Division as *not* providing the required *compelling* governmental interest that is required to be served by such discriminatory imposition of what is otherwise a general Sales Tax. The Arkansas Supreme Court held (Petitioner's App. A, A-3, Docket No. 90-29)

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[2]*Central Communications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 714 (1986); *Omega Satellite Products Co. v. City of Indianapolis*, 649 F.2d 119 (C.A.7, 1982); and *Community Communications, Inc. v. City of Boulder*, 660 F.2d 1370 (C.A.10, 1981).

> There was uncondtradicted testimony to the effect that a cable television enterprise pays a franchise fee for the use of the public right-of-way. It is true that the use of the public rights-of-way by cable television may be subjected to more regulation as has been suggested in some cases . . . . However, those cases involve regulation related to access to or use of the rights-of-way rather than a tax which has no relationship to the acquisition of the privilege of using public property. We thus find the fact that cable television uses public property and must obtain a franchise to do so should not control the result in this case.

The cable operators and taxpayers submit that this Court should affirm the Arkansas Supreme Court's declaration that Act 188 of 1987 unconstitutionally imposed Arkansas' state and local Sales Taxes upon charges for cable television service during the period from July 1, 1987, through June 30, 1989, by adopting this same reasoning as is set out above.

The state of Arkansas attempts to equate (for purposes of its comparison of similarly situated taxpayers in this case) governmental action in the area of economic regulation of private business to governmental action that imposes taxes. The State of Arkansas makes no distinction in these two forms of exercising governmental power, by alleging that both actions are merely forms of governmental regulation. In its brief (Pet. Br. p. 15), the State of Arkansas maintains—

> However, whether the complaint is made about a Sales Tax, a franchise tax, a franchise grant, or access regulations, it is still a complaint about governmental regulation. Therefore, this distinguishing feature of cable television justifies that differing tax treatment under Act 188 of 1987.

It must be noted that the State of Arkansas now apparently *admits* in its brief that Act 188 of 1987 provides for a

"differing tax treatment" for cable television, as compared to other businesses involved in either the electronic or print segments of the mass communications media. This statement must be taken by this Court as an admission against interest by the State of Arkansas.

However, and more importantly here, cable operators and taxpayers in this proceeding maintain that this Court has never rendered a decision that held that the power to tax and the power to economically regulate were the same. In fact, in the *Minneapolis Star* decision, this Court specifically noted the long line of cases that held that the power to tax is the power to destroy, and that where discriminatory taxation is found among similarly situated First Amendment protected businesses, that a strict scrutiny will be applied and the burden of proof is shifted to the taxing authority to establish a *compelling* governmental interest that is being served by this incidental infringement upon the taxpayers' rights of free speech and free press which interest cannot be met in some other fashion.

The United States Court of Appeals for the District of Columbia, in its decision in *Quincy Cable TV, Inc. v. FCC*, 769 F.2d 1434 (C.A.D.C., 1985), *cert. denied*, 476 U.S. 1169 (1986), a case where that Court struck down the FCC's "must carry" regulations the agency sought to impose on cable television, that circuit court applied a logical and proper analysis of the First Amendment rights of cable television operators and subscribers, and then held (768 F.2d, at 1448-1449):

> It has become something of a truism to observe that "differences and characteristics of news media justify differences in the First Amendment standards applied to them. " . . . The suggestion is not that traditional First Amendment doctrine falls by the wayside when evaluating the protection due novel modes of communication. For the core values of the First Amendment clearly transcend the

> particular details of the various vehicles through which messages are conveyed. Rather, the objective is to recognize that those values are best served by paying close attention to the distinctive features that differentiate increasingly diverse mechanisms through which a speaker may express his views.
>
> * * *
>
> Nor do we discern other attributes of cable television that would justify a standard of review analogous to the more forgiving First Amendment analysis traditionally applied to the broadcast media. We cannot agree, for example, that the mere fact that cable operators require use of a public right-of-way—typically utility poles—somehow justifies lesser First Amendment scrutiny . . . The potential for disruption inherent in stringing coaxial cables above city streets may well warrant some governmental regulation of the process of installing and maintaining the cable system. But hardly does it follow that such regulation could extend to controlling the nature of the program that is conveyed over that system. No doubt a municipality has some power to control the placement of newspaper vending machines. But any effort to use that power as a basis of dictating what must be placed in such machines would scarcely be valid.

The evidentiary record in this case clearly establishes that cable operators in Arkansas pay a franchise fee as "rental"[3] for their use of this public property in the conduct of their cable television businesses (J.A. 78-79, R. 705). The strained logic adopted by the Arkansas Revenue Division (in an attempt to justify its discriminatory taxation of cable television services) i.e. cable television's greater use of the

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[3]For a full discussion of the purpose and extent of these municipal "franchise fees" as "rent" for the use of the public rights-of-way, see the decisions in *Group W Cable, Inc. v. City of Santa Cruz*, 669 F.Supp. 954, 972-975 (N.D. Cal., 1987) and *Century Federal, Inc. v. City of Palo Alto*, 710 F.2d 1559 (N.D. Cal., 1988).

public rights-of-way establishes a compelling governmental interest that is sufficient to overcome the admittedly discriminatory imposition of Arkansas' otherwise generally applicable state and local Sales Taxes to cable television services, but not to charges for other services or products sold by the electronic segment of the mass communications media in Arkansas, should be rejected, out-of-hand, by this Court.

The television programming provided by the "scrambled" satellite broadcast television services in return for the payment of a subscription fee is virtually identical to the programming services provided by cable operators to their subscribers for a subscription fee. Thus, the state's *admitted* discriminatory imposition of its otherwise generally applicable Sales Taxes to charges for cable service, while *not* subjecting charges for "scrambled" satellite subscription service to the same Sales Taxes, is a clear violation of the taxpayer's First Amendment rights of free speech and free press that cannot be justified, in any way, because the cable operators make a greater use of the public rights-of-way than do other businesses engaged in the mass communications media.

Accordingly, the cable operators and taxpayers submit that this Court should affirm that portion of the Arkansas Supreme Court's decision that held the Sales Taxes imposed by Act 188 of 1987 were unconstitutional, because the State of Arkansas has totally failed to carry its burden of establishing a *compelling* governmental interest that was served by such discriminatory taxation. This Court should therefore affirm that portion of the Arkansas Supreme Court's decision below that declared Act 188 of 1987 to be unconstitutional for the same reasons chosen by the Arkansas Supreme Court.

II. THE PETITIONER'S ALLEGATIONS THAT THE MEMBERS OF THE ARKANSAS GENERAL ASSEMBLY LACKED KNOWLEDGE OF THE EXISTENCE OF "SCRAMBLED" SATELLITE

BROADCAST SUBSCRIPTION SERVICES ARE NOT BASED UPON ANY EVIDENTIARY FACTS ESTABLISHED IN THIS CASE AND THERE IS NO LEGAL THEORY ADOPTED BY ANY COURT THAT WOULD JUSTIFY THE ADMITTEDLY DISCRIMINATORY IMPOSITION OF ARKANSAS' STATE AND LOCAL SALES TAXES BY ACT 188 OF 1987.

The State of Arkansas has raised a novel argument in its brief (Pet. Br. pp. 15-18), which argument the state first raised in its Petition for Rehearing before the Arkansas Supreme Court. This argument is that the Arkansas General Assembly was not aware of the existence of "scrambled" satellite television broadcast services when it adopted Act 188 of 1987, and, if there was a discriminatory imposition of Arkansas' otherwise general Sales Taxes upon charges made by providers of and subscribers to "scrambled" satellite services and cable television services, that such unconstitutional discrimination could be justified because it was "unintended" and was corrected during the next regular session of the Arkansas General Assembly.[4] Though the Petitioner here states in his brief that "the record indicates" and he alleges that the testimony of his

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[4]The Respondents here (Petitioners in Docket No. 90-38) have specifically challenged the holding by the Arkansas Supreme Court that the Arkansas General Assembly's adoption of Act 769 of 1989, (in an attempt to extend to Arkansas' state and local Sales Taxes to subscription fees charged for "scrambled" satellite services) has, in fact, cured this admitted discrimination. These Respondents here believe this "curative" legislation was, in fact, "illusory," because most of the charges for "scrambled" satellite services are paid directly to the out-of-state satellite service providers. Therefore, such sales would be sales in interstate commerce that are completed where the subscriber's check is received, not a sale completed in Arkansas that would ever be subject to Arkansas' state and local Sales Taxes.

Sales and Use Tax Manager[5] forms a sufficient factual record upon which to base the state's argument that it did not "intend" to discriminate against the sale of cable television services when the Arkansas General Assembly enacted Act 188 of 1987, the argument must fall because it has no factual basis. The Petitioner's allegations that the Arkansas General Assembly cured such discrimination in a timely fashion, once the state "discovered" the "satellite television industry through the testimony in this case," are also baseless. These arguments must be rejected by this Court because there is absolutely no testimony or documentary evidence in the record in this case that would substantiate these mere allegations by the Petitioner in his brief.

The cable operators and the taxpayers submit that there is not only no factual basis for these arguments, they also maintain that there is no legal basis for these arguments either. The evidentiary record in this case is "totally" devoid of any evidence offered by Petitioner Pledger to establish the facts he has either eluded to or alleged in his brief (Pet. Br. 15-18).[6] Therefore, they believe that this specious argument by the Petitioners should be rejected, out-of-hand, by the members of this Court.

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[5]This testimony has no relation to the Petitioners' allegations in his brief concerning the Arkansas General Assembly's alleged lack of knowledge about "scrambled" satellite services, since this Tax Manager was a member of the Executive Branch of Arkansas' state government, not its Legislative Branch, and his motives or knowledge cannot be transferred or attributed to an entirely different branch of state government.

[6]The Respondents here cannot help but point out to this Court that Petitioner Pledger offered absolutely no documentary evidence and very little testimony in the trial court in the State of Arkansas' defense of Act 188 of 1987. Instead, the State of Arkansas appears to have rested its defense in this case primarily upon the mere evidentiary presumption of constitutionality that is accorded legislative acts. The quoted testimony of Gail Price, the Manager of the Sales and Use Tax Section of the Arkansas Revenue Division is *not* relevant to this argument by the Petitioner, and the state fails to cite to even one other page in the evidentiary record or the Joint Appendix to testimony or documents that would factually support this argument.

Notwithstanding the fact that the Petitioner alleges that the Arkansas General Assembly acted in a timely fashion in 1989 by adopting Act 769 of 1989 in an attempt to also extend the state's Sales Taxes to subscription fees charged for "scrambled" satellite television broadcast services, the cable operators and taxpayers point out that the testimony of the same Sales and Use Tax Manager relied upon by the Petitioner in this regard actually refutes the state's argument.

In their original Complaint (R. 1) filed in May of 1987, the cable operators and taxpayers alleged that the Arkansas General Assembly's failure to impose Arkansas' state and local Sales Taxes upon charges for "scrambled" satellite television broadcast subscription fees was one factor that caused the imposition of these excise taxes by Act 188 of 1987 to be unconstitutionally discriminatory in light of their First Amendment based challenge. At the August 19, 1987,[7] evidentiary hearing on the taxpayers' Preliminary Injunction to create an escrow account, the Executive Secretary of ACTA (JA 52-54, R. 672-674) and one of the ACTA cable operators (JA 83-85, R. 711-712) both testified about the existence of subscription fees for "scrambled" satellite television services. At that same hearing, the Arkansas Revenue Division's Sales and Use Tax Section Manager testified (JA 119-120, R. 753-754):

> Q. On the satellite—you've been in the Courtroom today and heard the testimony by the other witnesses.
>
> A. Yes.

---

[7]This evidentiary hearing took place less than three months after this class action suit was filed and less than five months after the Arkansas General Assembly had adjourned its Regular Session in the spring of 1987.

Q. The satellite transmission of either radio signals, such as the Arkansas Radio Network or the HBO, to a dish owner, there's testimony that there is a charge for that service. Is that subject to sales tax in the State of Arkansas? That service charge?

A. Say that again. I think—

Q. (Interposing) The HBO signal, I believe Plaintiff's Exhibit Number Two, was a listing of the scrambled services.

A. Right. Correct.

Q. And you can pay a monthly charge and have it unscrambled so you can receive it. I think Senator Bumpers has complained about the amount of the charge. But does that State of Arkansas impose a sales tax upon the providing of that service, that video service, to the individual owner or the amount he pays in gross proceeds. Is there a sales tax imposed upon that?

A. No, there is not.

Q. There is upon the delivery of that HBO program by a cable system, because of the provisions of Act 188 of 1987. Is that correct?

A. Correct, yes.

Q. Prior to the adoption of that Act, there was no sales tax imposed upon the providing of that service by cable television?

A. That's correct.

This testimony by the state's tax administrator alone refutes Petitioner Pledger's allegation in his brief (Pet. Br. 17) that—

> The Arkansas General Assembly acted at the earliest opportunity to correct what was suggested to be, but at the time not proven to be a difference in the tax treatment of two similar services, cable television service and satellite service.

The 76th Arkansas General Assembly met in "special session" no less than four (4) times in 1987 and 1988[8] *after* this "test" case was instituted to challenge the constitutionality of Act 188 of 1987. The Appellants submit that the Arkansas General Assembly's adoption of Act 769 of 1989 (at the urging of the Revenue Division)[9] occurred *only* after the parties had submitted their legal briefs in the Arkansas trial court and the state tax administrators (not the Arkansas General Assembly) finally became aware of the blatant and admitted discrimination that existed in the imposition of Arkansas' state and local Sales Taxes upon the charges made for providing similarly situated television programming among these businesses involved in the electronic segment of the mass communications media.

The cable operators and taxpayers submit that the "intent" of the Arkansas General Assembly in adopting either Act 188 of 1987 or Act 769 of 1989 was immaterial, where the evidentiary record compiled in this case establishes (and the tax administrator admits on brief) that discrimination in the imposition of the challenged state and local Sales Taxes actually existed. In this Court's

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[8]First Extraordinary Session (June 2-5, 1987); Second Extraordinary Session (October 6-9, 1987); Third Extraordinary Session (January 26-February, 1988); and Fourth Extraordinary Session (July 11-14, 1988). See Appellants' Response to Appellees' Petition for Rehearing before the Arkansas Supreme Court (p. 4)

[9]See the admissions attributed to the Arkansas Commissioner of Revenues during the time that Act 769 of 1989 was pending before the Arkansas General Assembly i.e. the purpose of this act was to lessen the discrimination of the Sales Tax in a Court case then pending on cable television (Plaintiffs' Motion for Judicial Notice, filed March 6, 1989, Exhibit A, R. 577 at 583).

Minneapolis Star decision, *supra*, Justice O'Connor stated (460 U.S., at 592-593):

> We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of a First Amendment . . . . We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment . . . . A tax that singles out the press or that targets individual publications within the press, places a heavy burden on the state to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment, and the judgment below is reversed. (Citations omitted).

The State of Arkansas cites no decision of this Court as authority for its proposition that it should *not* be held to the established standard of not imposing its excise taxes discriminatorily on businesses in the mass communications that are providing similar programming and which are protected by the First Amendment's rights of "free speech" and "free press." The home satellite television industry has existed in the United States for more than fifteen years, and the Petitioner's arguments based upon alleged surprise and lack of knowledge on the part of the Arkansas General Assembly, in light of the admittedly discriminatory imposition of an otherwise general Sales Tax by Act 188 of 1987, should be rejected by this Court because the "intent" of this legislative body is not controlling.

In the *Arkansas Writer's Project* case, the discriminatory exemption among magazines (that was successfully challenged in that case) had been on the Arkansas statute books for more than forty (40) years before it was declared unconstitutional. Surely, the fact that such discrimination went unchallenged for forty years did not estop the affected taxpayer from raising a valid constitutional challenge of discriminatory taxation, because the Arkansas General Assembly did not "intend" to

discriminate against general interest magazines when it adopted the exemption.

Arkansas did not attempt to impose its Sales Taxes upon cable television service until 1987. Therefore, the Respondents here submit that the Arkansas General Assembly's actions in discriminatorily imposing the state's Sales Taxes upon charges for cable television service by the adoption of Act 188 of 1987, while not taxing the subscription fees for virtually identical television programming provided by "scrambled" satellite television services, adequately forms the basis for holding such legislative action unconstitutional. The Arkansas Supreme Court below so held on these same grounds. Thus, the Respondents here submit that the Arkansas Supreme Court's decision regarding the unconstitutionality of Act 188 of 1987 should be affirmed.[10]

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[10]The Respondents here (Petitioners in Docket No. 90-38) have raised the argument that the Arkansas Supreme Court's comparison of similarly situated businesses within the mass communications media in Arkansas was too narrow and limited, and that the Arkansas Supreme Court erred in not adopting the broader test of also comparing businesses in the print segment of the mass communications media with businesses involved in the electronic segment of the mass communications media, as was done by both the Oklahoma Supreme Court in *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 P.2d 1312 (Okla., 1990) and the New York Court of Appeals in its adoption of the New York intermediate appellate court's decision in *McGraw-Hill, Inc. v. State Tax Commission*, 541 N.Y.S.2d 252 (App. Div. 3 Dept., 1989), *affirmed and adopted*, 252 N.E.2d 163 (N.Y., 1990). The Arkansas General Assembly clearly knew, in 1987, that the sale of newspapers and certain magazines by subscription were *not* subject to Arkansas' Sales Taxes. Thus, there existed a pattern of discriminatory imposition of Arkansas' state and local Sales Taxes among businesses involved in the print and electronic segments of the mass communications media, notwithstanding any allegation by the petitioner here concerning the lack of "intent" in the imposition of such taxes upon charges made for the providing of "scrambling" satellite television services to subscribers in Arkansas.

CONCLUSION

For the foregoing reasons, the cable operators and taxpayers respectfully request that this Court will affirm the portion of the decision rendered by the Supreme Court of Arkansas which held that the state and local Sales Taxes imposed by Act 188 of 1987 were unconstitutional, for the taxable periods that occurred between July 1, 1987, and June 30, 1989.

Respectfully submitted,

December 15, 1990

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Nos. 90-29, 90-38

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES C. PLEDGER ..... *Petitioner*

VS.

DANIEL L. MEDLOCK, ET. AL. ..... *Respondents*

AND

DANIEL L. MEDLOCK, ET. AL. ..... *Petitioners*

VS.

JAMES C. PLEDGER ..... *Petitioner*

CONSOLIDATED CASES

ON WRIT OF CERTIORARI TO
THE ARKANSAS SUPREME COURT

BRIEF ON THE MERITS FOR APPELLEE IN DOCKET NO. 90-38

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ARKANSAS LEGISLATIVE DIGEST, INC.

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CONSOLIDATED CASES

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BRIEF ON THE MERITS FOR APPELLEE
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SUMMARY OF ARGUMENT

The Appellants have stated that a conflict exists between the decision of the Supreme Court of Arkansas in this case and decisions of other state and federal appellate courts regarding the First Amendment standards to be applied to cable television, and that the decision of the Arkansas court is erroneous. This conclusion is based upon a very broad reading of cases issued by this Court and by other federal case decisions. Arkansas' differing sales tax treatment of the print

and cable media is justified by important or substantial interests, not the least of which are increasing revenues for the education of Arkansas' children and to meet the needs of the state's citizenry. Further, the fact that Arkansas has no compensating use tax upon the service of descrambling satellite television signals is also not helpful to Appellants' First Amendment position because the compensating tax statutes do not apply to any services.

The Appellants have also alleged that Act 769 of 1989 violates their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. This legislation, when viewed under the "rational basis" test, survives this constitutional challenge. Therefore, there is adequate delineation of the First Amendment rights of cable television, and this Court should affirm the decision of the Supreme Court of Arkansas with regard to Act 769 of 1989.

ARGUMENT

THE STATE OF ARKANSAS IS NOT UNCONSTITUTIONALLY IMPOSING ITS SALES TAXES UPON THE PURCHASES AND SALES OF CABLE TELEVISION SERVICES.

I.

First Amendment Considerations

The Appellants have stated that there is a real conflict between the Supreme Court of Arkansas' application of the First Amendment test enunciated by this Court in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenues*, 460 U.S. 575, 75 L.Ed.2d 295, 103 S.Ct. 1365 (1983) and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 95 L.Ed.2d 209, 107 S.Ct. 1722 (1987), and similar decisions by other state and federal appellate courts. In *Minneapolis Star*, this Court repeatedly emphasized that the case dealt with the press, and struck down the tax at issue there because it singled out the press, and because it targeted a small group of newspapers. This Court stated:

> "When the state singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." (75 L.Ed.2d at 304-305)

Similarly, in *Arkansas Writers' Project*, this Court held

that because the tax in question targeted only a small group "within the press" and, more repugnantly, was imposed on the basis of a publication's content, the tax must be declared invalid. Both of these cases, as well as *Louisiana Life, Ltd. v. McNamara*, 504 S.2d 900 (La. App. 1st Div., 1987), cited by Appellants at page 14 of their Petition, turned on the fact that a tax which "singles out the press" violates the right of freedom of the press guaranteed by the First Amendment. Cable television is not a part of the press which *Minneapolis Star*'s historical narrative emphasized as being worthy of the highest degree of protection. Cable television is entitled to a degree of free speech protection under the First Amendment, but it has not historically been accorded the heightened degree given to the press, the collective body of printed publications.

A. First Amendment Protection Afforded to Cable Television

This Court has found, and it is not disputed that the cable television industry is engaged in activities which "plainly implicate First Amendment interests." *City of Los Angeles v. Preferred Communications, Inc.*, 467 U.S. 488, 494 (1986). However, merely implicating First Amendment protection "does not end the inquiry" regarding the validity of a particular burden by a regulatory body. *Id.* at 495. The three concurring justices in *Preferred Communications*, supra, succinctly stated the task before this Court and the other courts of this country in dealing with the problems of First Amendment protection for burgeoning industries such as cable television when they stated:

> Different communications media are treated differently for First Amendment purposes. Compare, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974),

> *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984). In assessing First Amendment claims concerning cable access, the court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard, or whether those characteristics require new analysis.

But even before an analysis of the level of First Amendment protection due to cable television is examined, it is important for the Court to understand the nature of the Arkansas tax being challenged by the Appellants in this case.

B. Arkansas Gross Receipts Tax

Since 1941, Arkansas has imposed a Gross Receipts (Sales) tax on tangible personal property. The gross receipts for the sale of all tangible personal property are subject to the sales (or use) tax, unless specifically exempted. The same statutory scheme more recently has added several enumerated services that are subject to the sales tax. Although they have been described by the Appellants as certain clearly enumerated services, there are in fact a great multitude of services similarly situated to cable television which are not subject to the Arkansas sales tax. For example, rental and sales of video tapes are taxed as tangible property. Movie theatre tickets are taxed, as are theatre tickets, concert tickets, records, tapes, cassettes, etc. Since 1989, the gross receipts for descrambling satellite television are taxed. Each of these forms of media are in the business of disseminating primarily news and/or entertainment features to citizens for a subscription price or ticket price. There is no special tax, as was the case in *Minneapolis Star*, supra.

The Arkansas tax is imposed upon *gross receipts*. The

State of Arkansas does not tax speech nor does it tax dissemination of information. It is a business tax, pure and simple. It is a general tax, which is equally administered to all similarly situated businesses. There is no tax on wireless radio and television because there are no gross receipts for services which are susceptible to the taxation scheme.

The Arkansas sales tax does exempt sales of newspapers and magazines by subscription, because of the longstanding relationship, exhibited by lack of regulation, between government and the traditional press. However, neither magazines nor newspapers are similarly situated with cable television. Certainly it cannot be denied that there are similarities between the message carried by newspapers and the message carried by cable television in terms of news, entertainment, and the like. However, when access to that message is not an issue, courts generally have not held that identical regulatory applications must apply. *Quincy Cable T.V. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985); *Times Mirror, Inc. v. City of Los Angeles*, 237 Cal. Rptr. 346 (1987). *Preferred Communications*, supra, involved access to the public. The instant case does not. Here, cable television services are fully available to all citizens living within the delivery areas within the State of Arkansas. Cable television is run as a business and it is being taxed as a part of a regulatory business scheme for the purpose of raising revenue for the State of Arkansas, and not for the purposes of limiting speech.

Even if it were established that cable television was entitled to the same degree of protection as the print media, the tax at issue in the present case withstands constitutional challenge. There is no "singling out" of cable television. Ark. Code Ann. § 26-52-301(3)(D)(i) (Supp. 1989), cited by Appellants at pages 24a and 25a of their Petition for

Certiorari, imposes sales tax on cable television service as a part of the state's general scheme of sales tax imposition. As previously stated, cable television is one of many services and products subject to the state's general tax levied upon the gross receipts derived from sales of those services and products. The same general sales tax is applied to sales of utilities services, books and magazines sold at retail, admissions to movie theaters, sales and rentals of videotaped movies and documentaries, and many other products and services. No special tax is involved; cable television is not "singled out"; and no group of cable service providers is targeted any differently than another. The tax applies evenly to all cable television service. Moreover, it is not even argued by Appellants that the infirmity so apparent in *Arkansas Writers' Project* is present in the case at bar. Content-based discrimination, which has been deemed so offensive to the First Amendment, is not an issue in the present case.

C. Distinctions Betw en the Media

This Court, in *Preferred Communications*, supra, suggested that the cable medium may be distinguishable from the newspaper medium and that more government regulation of the cable medium may be permissible, because cable requires use of public ways and installation of cable systems may disrupt public order. Appellants argue that use of the public right-of-way and disruption of public order is not a valid distinction between the print media and cable television. If the Arkansas sales tax on gross receipts was a limitation on expression, or if it was in the way content based or oriented, the Appellees would agree. However, the standards of differentiation with the press for purposes of limiting expression are completely different from the standards of differentiation for the purposes of distinguishing it for non-

speech regulation. *Quincy Cable T.V. v. F.C.C.*, supra. The vast majority of the cases that have appeared in the federal courts concerning cable television are on the issue of access. A sales tax on gross receipts generally applied to all similarly situated businesses does not limit access, nor is it entitled to the deference of First Amendment protection afforded to the press.

U.S. v. O'Brien, 391 U.S. 367, 20 L.Ed.2d 672 (1968), cited by Appellants at page 24 of their Brief on the Merits, clearly held that governmental regulation is justified under First Amendment review if:

> (1) The regulation is within the constitutional power of the government;
>
> (2) The regulation furthers an important or substantial interest;
>
> (3) The regulation is unrelated to suppression of free expression; and
>
> (4) Any incidental restriction of First Amendment freedoms is no greater than necessary to further the governmental interest.

(20 L.Ed.2d at 680)

The same standard was applied in *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N. D. Cal. 1987), and *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D. C. Cir. 1977), two other cases cited by Appellants.

In *Group W Cable*, the district court stated "as this court had previously stated in *Preferred Communications*" the precise degree of First Amendment protection due cable

television is in doubt. In an *access case* there must be a material difference from the print media, otherwise the same level of protection would be due. However, the First Amendment does not preclude government regulation of a non-communication aspect of speech. In this case, the *O'Brien* case was applied, and the Court found that because there was an attempt to deny access, the same level of protection for the press would apply to cable television.

Does the sales tax on cable television service pass the *O'Brien* test? The answer is clearly yes. While cable television is similarly situated to many businesses within the classification for taxation of services, it is not similarly situated with other media because it has a very real impact upon public ways and is of a character completely dissimilar to the other media. In the instant case, the *O'Brien* test can be applied, and because no denial of access is required, the Court could legitimately uphold a distinction between the print media and cable television for regulatory purposes. An analysis of the four prongs of the *O'Brien* test discloses:

(1) The regulation must be within the constitutional powers of the government. There is no denial that a general sales tax on gross receipts of similarly situated services is well within the constitutional power of the State of Arkansas and its various cities and counties.

(2) The regulation must further an important or substantial interest. The raising of revenue for the State of Arkansas and its counties and cities has been found to be a critical interest of government, *Minneapolis Star*, supra. In the case of *Century Federal, Inc. v. City of Palo Alto*, 710 F.Supp. 1559 (N.D. Cal. 1988) a district court construed *Minneapolis Star* to mean that the raising of revenue was a

compelling state interest when accomplished by a general tax rather than a specific tax, as is the case at bar.

(3) The regulation must be unrelated to the suppression of free expression. The general tax on gross receipts is completely unrelated to the suppression of free expression. There is no content related aspect to this case whatsoever, nor is there any allegation of denial of access.

(4) An incidental restriction of First Amendment freedom must be no greater than necessary to the furtherance of the government interest. In this case, there is no incidental restriction of First Amendment freedom. The taxation of gross receipts of similarly situated businesses neither denies access nor is content based. Therefore, the government interest in raising revenue is greater than any incidental restriction of First Amendment rights and privileges.

Further discussion should be given to the second prong of the *O'Brien* test. The placement of cable television service within the general sales tax base goes no further than necessary to advance the "important or substantial interest" of raising revenue to provide for the education of Arkansas' children and to meet the needs of its citizens. The Supreme Court of Arkansas in this case determined that for tax purposes sales of "scrambled" satellite television broadcast subscription services and sales of cable television service should be treated similarly. Although this Appellee has challenged this finding (*Pledger v. Medlock, et al.*, Supreme Court of the United States, docket number 90-29), the General Assembly of the State of Arkansas chose to provide equal tax treatment of those services. This treatment is provided in Act 769 of 1989, which Appellants cite at pages 24a and 25a of their Petition for Certiorari (Appendix E). The

Emergency Clause of this Act states:

> "It is hereby found and determined by the General Assembly that the State of Arkansas is in serious need of additional revenue for the purpose of funding critical education programs and other essential services required by the citizens of the state and the provisions of this act are necessary to raise needed revenue. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect on and after July 1, 1989."

Appellants contend that the raising of revenue is not an interest which will satisfy the *O'Brien* test. Appellants' formula would require that a compelling interest be exhibited by the government. The showing of a compelling interest is not required in this case. *O'Brien* expressly states that a governmental regulation must further an "important or substantial interest." Appellants' chief authority, *Minneapolis Star*, recognized that raising of revenue is an "interest [which] is critical to any government." 460 U.S. at 586. Surely an interest which is "critical" meets the criterion of "important or substantial." The Court in *Minneapolis Star* acknowledged the importance of such interest; it simply determined that even such an important interest could not support a special tax on ink and paper which was levied against only one newspaper. Likewise, the Court in *Arkansas Writers' Project* stated:

> "The Commissioner . . . asserts the state's general interest in raising revenue. While we have recognized that this interest is an important one, . . . it does not explain selective imposition of the sales tax on some

magazines and not others, based solely on their content." (107 S.Ct. at 1722)

Again, in *Arkansas Writers' Project*, this Court found that when there was differentiation between the media *based on content*, a state must show a compelling interest for that different treatment. Granted, the raising of revenue can be seen as not being a compelling interest to justify a content-based discrimination. However, in the instant case, there is no content-based distinction. Further, there is no selective imposition of sales tax on some cable television systems and not others. Therefore, the recognized important interest of raising revenue is sufficient, and the *O'Brien* test is fully satisfied.

As stated by the Supreme Court of Arkansas in *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), all legislative enactments are presumed to be constitutionally valid. The legislature has broad discretion in creating classifications for taxation purposes. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986); *Times Mirror Co. v. City of Los Angeles*, supra. The court in the *Times Mirror* case also stated that a tax which is neither special nor unique is a valid legislative enactment even though it incidentally impacts upon First Amendment activities. Finally, that Court recognized the power of the legislature to enact taxes "in order to generate revenue so long as those laws operate evenhandedly upon all similarly situated." 237 Cal. Rptr. at 351. The *Times Mirror* Court specifically determined that its decision was consistent with *Minneapolis Star*, *Arkansas Writers' Project*, and *City of Alameda v. Premier Communications Network, Inc.*, 202 Cal. Rptr. 684 (Cal. App. 1984), all cases relied upon by Appellants.

There is a long and inherent tradition of a government hands-off with the press which has been held not to apply to broadcast or cable television. *Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981). The government and cable broadcasters are tied in a way that the government and newspapers are not. The Court in *Community Communications* so held because of the great use of public property through right-of-way and public intrusion, which is not found in the newspaper business. The Arkansas Supreme Court in its opinion below found that payment of a franchise fee by cable companies in Arkansas satisfied the purchase of the use of those rights-of-way. That may be so, and that in fact is the very nature of the public franchise fee. However, that does not in any way lessen the distinction which is inherent in the press and cable television because of the disruption of public services and ways.

Cable television is not "similarly situated" when compared to any other medium. Its use of and impact upon public ways distinguishes it from all broadcast and print media, and its enjoyment of virtually unlimited access to households puts it in a different class than the print media. *Omega Satellite Products v. City of Indianapolis, Inc.*, 694 F.2d 119 (7th Cir. 1982). In *Omega Satellite Products*, the Court discussed different First Amendment treatment between television (either wireless or cable) and other media because of universal access resulting in a need to protect children. Appellants make light of this argument but it has been accepted by the Court and is readily understandable because of the pervasive influence of television in our present society. Television has become the electronic babysitter for the generations growing up in the '60s, '70s, '80s and now the '90s. While print publications may be subscribed to and brought into the home on a voluntary basis, once they are in the home they can be

secreted, or otherwise disposed of without being openly available to children if the parents so choose. However, television is of universal availability to anyone in the household with the ability to flip the switch. Other than certain lock-out features available in some communities for certain stations, there is no way to determine who or when or for what purpose a program is watched in the privacy of a home. The State obviously has an interest, to a certain extent, to regulate such a pervasive disseminator, and that power of regulation was recognized in *Omega Satellite Products*. This does not imply denial of access. In fact, access is open. It only implies regulation based on a differing level of protection because of universal access.

Cable television simply cannot be equated with any other entity for purposes of the "similarly situated" formula. It has a very real impact upon public ways and is of a character completely dissimilar to the press. Further, although the Appellees disagree with the finding of the Supreme Court of Arkansas that the service of descrambling satellite television signals is similarly situated to cable television service, the Arkansas General Assembly in enating Act 769 of 1989 corrected the only alleged defect found by the court to exist.

Both the Supreme Court of Oklahoma, in the case of *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 P.2d 1312 (Okla. 1990), and the intermediate New York appellate court, in the case of *McGraw-Hill, Inc. v. State Tax Commission* (App. Div. 3 Sept., 1989), affirmed and adopted, 252 N.E.2d 163 (N.Y., 1990), in dismissing the important distinction between cable television and the other media, have gone too far in attempting to construe *Minneapolis Star* and other above-cited cases to read in favor of Appellants' position.

D. Arkansas Compensating Tax

Another portion of Appellants' First Amendment argument addresses the fact that Act 769 of 1989 did not amend the Arkansas Compensating Tax Act (cited by Appellants at Appendix F, page 26a of their Petition for Certiorari) to impose the tax on the service of descrambling satellite television signals. The Arkansas compensating (use) tax is levied on the privilege of storing, using, distributing, or consuming within the state any article of tangible personal property purchased for storage, use, distribution, or consumption in the state. The problem with this part of Appellants' argument is that the compensating tax, unlike the gross receipts (sales) tax, was not previously levied on the sale of cable television service. The very nature of the gross receipts tax makes it applicable only to transactions between a buyer and seller within the State of Arkansas. By definition, the compensating tax was and is not applicable to *any* service. Therefore, the Appellants' argument in this regard is without merit.

II.

Fourteenth Amendment Considerations

The Appellants have also alleged that Act 769 of 1989 violates their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. (Joint App. P. 11) In *Streight v. Ragland*, 655 S.W.2d 459, it was determined by the Supreme Court of Arkansas that state tax legislation should be reviewed under the "rational basis" test. The parties who attacked the tax legislation in *Streight* urged the Arkansas Supreme Court to abandon the rational basis test. In refusing such position the Court held:

"Under the rationality standard of review, we must

> presume the legislation is constitutional, i.e. that it is rationally related to achieving a legitimate governmental objective. This presumption we indulge locates the burden of proof. It imposes upon the party against whom it is directed the burden of proving the unconstitutionality of the legislation, i.e. that the act is not rationally related to achieving any legitimate objective of state government under any reasonably conceivable state of facts . . . All tax measures usually involve some discrimination, . . . but these discriminations are not constitutionally impermissible as long as they are not arbitrary and are supported by a rational and legitimate basis . . . It is simply impermissible for us to evaluate the wisdom of legislation." (655 S.W.2d at 463-465)

The same facts which render cable television completely dissimilar to all other media provide more than sufficient support for subjecting sales of cable television service to the general sales tax. Cable's use of public ways and disruption of public order place it in a different class for both First Amendment and equal protection considerations. As stated by the very cases upon which Appellants so heavily rely, *Minneapolis Star* and *Arkansas Writers' Project*, the governmental objective of raising revenue is important, indeed critical. An objective which is so described is obviously one which is legitimate. Therefore, the tax legislation at issue in the present case meets and surpasses the requirements of the rational basis test set forth in *Streight v. Ragland*.

No fundamental guarantee has been significantly diminished or curtailed by the tax legislation challenged by Appellants. As a result, equal protection analysis requires no more than the application of the rational basis standard. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307,

49 L.Ed.2d 520, 96 S.Ct. 2562 (1976); *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973).

As held in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959):

> "The States have a very wide discretion in the laying of their taxes . . . The state may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government."
> (358 U.S. at 526, 527)

Allied Stores made it clear that tax legislation is presumed to be rationally related to a legitimate governmental objective. The great deference given to a legislature in its exercise of discretion as to the levying of taxes is justified because it is the legislature which must determine which taxes are economically sound in order to raise revenue. If the legislature determines that collection of a tax would be unreliable or burdensome to the government as applied to a particular transaction, it may choose to exempt that transaction in order to prevent economic waste. As stated by this Court in *Madden v. Kentucky*, 309 U.S. 83 (1940):

> "Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden."
> (309 U.S. at 88)

Imposition of the general sales tax upon sales of cable

television service does not significantly burden any rights of Appellants. Without significant diminishing or curtailment of a fundamental right, there can be no infringement of such right. *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, a case relied upon as authority by Appellants, acknowledged:

> ". . . rules restricting speech do not necessarily abridge freedom of speech . . . Restriction becomes abridgement only when government seeks to limit speech because it is on one side of the issue rather than another, . . . or because it is thought unwise, unfair, false, or dangerous." (567 F.2d at 46, 47)

No First Amendment protection having been infringed, Appellants cannot make some higher degree of scrutiny applicable to the present case. The presumption of rationality which attaches to all tax legislation cannot be overcome unless a challenger, such as Appellants herein, proves that no conceivable rational objective could support the legislation. *Streight v. Ragland*, 655 S.W.2d 459. Appellants have not and cannot meet that burden of proof, and no infringement of any fundamental right has been proven by Appellants.

CONCLUSION

For the foregoing reasons, the Appellees respectfully request that this Honorable Court affirm the decision of the Supreme Court of Arkansas with regard to Act 769 of 1989.

Respectfully submitted,

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Nos. 90-29, 90-38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES C. PLEDGER ..... *Appellant*

VS.

DANIEL L. MEDLOCK, ET. AL. ..... *Appellees*

CONSOLIDATED CASES

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

REPLY BRIEF ON THE MERITS BY APPELLANT IN DOCKET NO. 90-29

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REPLY BRIEF ON THE MERITS BY APPELLANT IN DOCKET NO. 90-29

I.

THE GREATER USE OF THE PUBLIC RIGHTS-OF-WAY BY CABLE TELEVISION ESTABLISHES SUFFICIENT GOVERNMENTAL INTEREST TO JUSTIFY DIFFERENTIAL TAX TREATMENT.

On page 11 of Appellees' Brief on the Merits, Appellees state that the State's imposition of its sales tax to charges for cable service, "while not subjecting charges for 'scrambled' satellite subscription service to the same Sales Taxes, is a clear violation of the taxpayer's First Amendment rights of free speech and free press that cannot be justified, in any way, because the cable operators make a greater use of the public rights-of-way than do other businesses engaged in the mass communications media."

As pointed out by Appellant in his Brief on the Merits in *Medlock v. Pledger* (Docket No. 90-38), the companion case to this case, cable television is not similarly situated to other media. Its use of and impact upon the public ways distinguishes it from all broadcast and print media. *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982). This distinction extends to satellite television service. The unique nature of cable television service is further described at pages 9 and 10 of the *amicus curiae* brief submitted by the City of New York, et al in Docket No. 90-38:

> "In order to gain access to its paying subscribers, cable operators must make substantial use of valuable public property. Coaxial cable must be hung from utility poles, housed in underground utility ducts or otherwise placed in or across the public rights-of-way. Furthermore, cable operators necessarily depend upon state and

> local authorities to exercise their powers of eminent domain in order to ensure cable's access to private property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) ('*Loretto*'). The grant of a cable franchise by a franchising authority carries with it the right to make the necessary use of public property and easements. Cable Act § 621(a)(2), 47 U.S.C. § 541(a)(2). Such grant allows the cable operator to obtain, at one time and at non-market clearing prices, all the necessary rights to reach that operator's subscribers — rights that are particularly valuable because they might otherwise be 'impossible to negotiate individually.' Brenner, 1988 Duke L. J. at 345-46. Furthermore, the grant of even a non-exclusive cable franchise by a franchising authority typically has the effect of according the cable operator a natural monopoly over the provision of cable services in its community." (footnote omitted)

As stated previously, the unique nature of cable television service justifies subjecting such service to Arkansas' general gross receipts (sales) tax, notwithstanding the fact that cable is entitled to some degree of First Amendment protection.

II.

LEGISLATIVE ACTION

Appellants have attempted to show that the Arkansas General Assembly, before this lawsuit, would seem to have had no reason to believe that there existed a gross receipt producing satellite television "descrambling" service in Arkansas which should have been given equal tax treatment

with cable television service. Appellant's discussion at page 15 of his brief of the testimony of Gail Price, Manager of the Sales and Use Tax Section of the Arkansas Department of Finance and Administration (Pet. App. E-1) was intended to draw a parallel between the state of knowledge about satellite television service at the Department of Finance and Administration and the subsequent adoption after trial by the General Assembly of Act 769 of 1989, which extended the sales tax to satellite television subscription service.

At page 16 of their Brief on the Merits, Appellees state:

> "The 76th Arkansas General Assembly met in 'special sessions' no less than four (4) times in 1987 and 1988 *after* this 'test' case was instituted to challenge the constitutionality of Act 188 of 1987." (footnote omitted)

These four "special sessions" (June 2-5, 1987; October 6-9, 1987; January 26-February 5, 1988; and July 11-14, 1988) all pre-date the date of the issuance of the trial court decision on March 10, 1989, and the date of the issuance of the decision of the Supreme Court of Arkansas on February 28, 1990. Therefore, it would be logical for the General Assembly to wait at least until the completion of the trial of this case to attempt to cure an alleged defect in the law.

CONCLUSION

For the reasons stated in this Brief and in his Brief on the Merits, Appellant respectfully requests that this Court reverse the judgment of the Supreme Court of Arkansas with regard to the constitutionality of Act 188 of 1987.

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No. 90-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL L. MEDLOCK, *et al.*,

Petitioners,

—against—

JAMES C. PLEDGER, COMMISSIONER OF REVENUES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF AMICUS CURIAE OF DOW JONES & COMPANY, INC. IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-38

DANIEL L. MEDLOCK, *et al.*,

Petitioners,

—against—

JAMES C. PLEDGER, COMMISSIONER OF REVENUES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF AMICUS CURIAE OF DOW JONES & COMPANY, INC. IN SUPPORT OF PETITIONERS

This brief is respectfully submitted, with the consent of the parties, pursuant to Rule 37.3 of the Rules of this Court, urging reversal of the decision below of the Supreme Court of Arkansas to the extent that it approved taxation of petitioners-taxpayers from and after July 1, 1989, on the grounds that the First and Fourteenth Amendments to the Constitution of the United States forbid such taxation in light of Arkansas' exemption from sales and use tax of much of the remainder of the press.

Amicus particularly urges that this Court's consideration of No. 90-38 take into account the issues raised by cases such as *Commissioner of Revenue of Tennessee v. Newsweek, Inc. et al.*, No. 90-273, *pet. for cert. pending*.

This brief does not address the issue which *amicus* views as most squarely posed by No. 90-29 (the petition consolidated with the instant petition), namely whether the taxation by the states of cable (and even perhaps broadcast) television is somehow outside the rule of *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).[1]

Plenary consideration of the issues raised in No. 90-38, however, may require that this Court answer the question ostensibly reserved in *Arkansas Writers' Project*: "whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax as applied to the press." 481 U.S. at 233. As set forth *infra*, *amicus* believes that an affirmative answer to this question is actually compelled by both the language and the logic of *Minneapolis Star* and *Arkansas Writers' Project* themselves. It is this issue to which this brief is addressed.

INTEREST OF AMICUS

Amicus Dow Jones & Company, Inc. is perhaps best known as the publisher of *The Wall Street Journal*, the largest circulation daily newspaper in the country. But Dow Jones also publishes, *inter alia*, the Dow Jones News Services, a group of traditional news wire services; Dow

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[1] *Amicus* notes that this Court has suggested that greater burdens on expression otherwise protected by the First Amendment may be permissible with respect to these regulated media. *E.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). We fail to understand, however, how the rationale of cases such as *Preferred Communications*, centering on access to utility poles and underground conduits, undercuts that of *Minneapolis Star* or *Arkansas Writers' Project* with respect to a sales tax on *services* such as Cable News Network (CNN).

Jones News/Retrieval, an interactive electronic database that includes "on-line" versions of the *Journal*, the News Services, and many other publications, including those published by others, *e.g.*, *Business Week* and *The Washington Post*; Telerate, a leading provider of real-time financial news and information; *American Demographics* magazine; and, through Dow Jones' Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states. Perhaps most intriguingly for present purposes, Dow Jones is the publisher of *Barron's National Business and Financial Weekly*, a tabloid-format journal printed on newsprint.

Dow Jones is thus keenly interested in the issue, raised in *Minneapolis Star*, 460 U.S. at 591-92, and *Arkansas Writers' Project*, 481 U.S. at 229-31, of whether (and when) a state may tax some members of the press but not others. Any definitive statement on this issue would have a substantial impact on Dow Jones as a taxpayer in various states.

SUMMARY OF ARGUMENT

In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), this Court held that it was presumptively unconstitutional to tax the press in a manner different from other taxpayers, or to single out some portion of the press for taxation. In *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987) these rules were reaffirmed, and tax distinctions among publications based on content were condemned as particularly repugnant. While *Arkansas Writers' Project*, however, ostensibly reserved the question of whether a sales tax distinction between different types of periodicals was, by itself, constitutionally suspect, the language and logic of both *Minneapolis Star* and *Arkansas Writers' Project* compel an affirmative answer to this question. (Point I)

In any event, the most common sales tax distinction between different types of periodicals— that between sales of (taxable) magazines and (exempt) newspapers— is inevitably content-based, and thus forbidden by *Arkansas*

Writers' Project. This is revealed by an analysis not only of the dictionary definitions of "magazine" and "newspaper", which rely heavily on content analysis, but also of many states' sales and use tax statutes and regulations, which do so as well. (Point II)

Moreover, the persuasive weight of authority in the state courts, much of it quite recent, has found taxation of some types of press entities where other types are exempt presumptively unconstitutional, and the cases most directly on point here were overlooked by the court below. (Point III)

Once the rule of *Minneapolis Star* and *Arkansas Writers' Project* applies, this Court has held that differential taxation of the press can only be sustained on a showing of a compelling state interest, and a tax narrowly tailored to achieving that interest. This Court and the state courts have rigorously applied this standard. The standard cannot be met here— as the State appears, by silence, to concede. (Point IV)

ARGUMENT

I.

THIS COURT'S DECISIONS TEACH THAT TAX LAWS TREATING ONE SEGMENT OF THE PRESS LESS FAVORABLY THAN OTHERS ARE CONSTITUTIONALLY SUSPECT UNDER THE FIRST AMENDMENT.

In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), this Court considered a Minnesota use tax on the cost of paper and ink products consumed in the production of a publication. This use tax was a specifically-enacted departure from the general scheme (in Minnesota, as in most states) of complementary sales and use taxes: There was no corresponding sales tax. In addition, Minnesota had an exemption amounting to an annual credit of $4,000 against the special use tax. The result of this credit was that fewer than five percent of the State's paid circulation newspapers were subject to tax liability, and that approximately two-thirds of the revenue generated by the tax came from a single taxpayer, Minneapolis Star and Tribune Co. 460 U.S. at 577-79. This Court held that the Minnesota scheme was doubly violative of the First Amendment. First, the Court held that it is presumptively unconstitutional to tax the press in a manner different from other taxpayers:

> "Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."

460 U.S. at 585 (footnote omitted). Second, the Court ruled it was unconstitutional to target for taxation a subset of the press:

> "[R]ecognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme."

Id. at 592. It is this second holding which is implicated by this case.

This Court reached that holding based on the *potential* dangers of differential treatment:

> "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected.
>
> * * *
>
> "[T]he very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment."

460 U.S. at 585, 588 (emphasis in original). *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) ("the power to tax is the power to destroy."). *See also Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).

While we can rest secure in the knowledge that no legislature (or executive) will tax the press out of existence if it must levy the same tax on all enterprises, that security diminishes if the press can be made subject to special taxes. *Minneapolis Star*, 460 U.S. at 585. Following this logic, it is even more dangerous to permit some press entities to be subject to taxes not levied on others. In particular, local newspapers of general circulation retain considerable influence with local legislators (and such influence may even have grown as most local papers attain

monopoly status). But this influence may not accrue to other members of the press (or to the "national" media in various local contexts), who may therefore be more vulnerable to censorial taxation.[2] This is not merely a matter of theory: Retail newspaper sales are exempt from tax in many states where magazine sales are not exempt. *See* Point II, *infra*.

In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Court revisited many of the issues raised in *Minneapolis Star*, and reaffirmed its earlier holdings while somewhat clarifying their reach.

The *Arkansas Writers' Project* Court ostensibly reserved the question of "whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax, as applied to the press." 481 U.S. at 233. But *amicus* respectfully submits that the language and logic of the decision compel an affirmative answer to the question the Court reserved.

After all, the *Arkansas Writers' Project* Court held that,

> "Because the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in *Minneapolis Star*."

481 U.S. at 229. *Amicus* submits that this statement of the law would be equally valid if the word "periodicals" (or "publications", or even "members of the press") were substituted for "magazines".[3] The question posed in

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[2]The taxpayer in *Minneapolis Star* was not obligated to show "any impermissible or censorial motive on the part of the legislature," 460 U.S. at 580, although, of course, any such showing would suffice to invalidate a tax. *Cf. Grosjean v. American Press Co.*, 297 U.S. 233 (936).

[3]*Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) has been said to run counter to this argument. *Hearst Corp. v. Iowa Department of Revenue and Finance*, ___ N.W.2d ___ (Iowa Sept. 19, 1990), Slip op. at 18-19, 21-25 (relying on *Regan* to uphold tax); *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d 1304, 1308 n.6 (Fla. 1990) (calling State's reliance on *Regan* misplaced);

Arkansas Writers' Project is thus answered by the same case: Treating some types of periodicals— newspapers— more favorably than others— magazines— is a basis for invalidating a sales tax scheme.

Southern Living, Inc. v. Celauro, 789 S.W.2d 251, 252 (Tenn. 1990), *cert. pending sub nom Commissioner of Revenue of Tennessee v. Newsweek, Inc.*, No. 90-273 (same); *Times Mirror Co. v. City of Los Angeles*, 192 Cal. App. 3d 170, 183 n. 8, 185, 237 Cal. Rptr. 346, 354-55 and n. 8 (1987), *app. dism'd*, 484 U.S. 1022 (1988) (relying on *Regan* to uphold tax). *See also* Petition for Writ of Certiorari in No. 90-273 at 11-13 (arguing for applicability of *Regan*).

As pointed out by the Florida Supreme Court, however, *Regan*, decided just two months after *Minneapolis Star*, makes no reference to the earlier case. The Opinion of the Court in *Arkansas Writers' Project*, in turn, makes no reference to the Opinion of the Court in *Regan*. This is because *Regan* belongs to a line of authority distinct from, and involving different First Amendment issues than those addressed in *Minneapolis Star* and *Arkansas Writers' Project*.

It is true that the *Regan* Opinion contains the sentence: "Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose." 461 U.S. at 547. But the Opinion also states, in the very next sentence: "Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right." *Id.*

Regan, dealing with a content-neutral subsidy of lobbying, was a "rational basis" case. But in matters such as the instant one, including *Minneapolis Star* and *Arkansas Writers' Project*, dealing as they do with the fundamental right of freedom of the press, this Court demands more:

> "A tax that singles out the press, or targets individual publications within the press, places a heavy burden on the State to justify its action."

Minneapolis Star, 460 U.S. at 592-93. *See also Arkansas Writers' Project*, 481 U.S. at 227, 231; *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-707 (1986); *Minneapolis Star*, 460 U.S. at 585 n. 7. *Regan* is inapposite here.

II.

THE MOST COMMON DIFFERENTIAL TAXATION OF THE PRESS— FAVORING NEWSPAPERS OVER MAGAZINES— IS CONTENT-BASED, AND THEREFORE CONSTITUTIONALLY IMPERMISSIBLE.

Arkansas Writers' Project involved Arkansas' sales tax, from which all newspapers and "religious, professional, trade and sports" magazines were exempt. 481 U.S. at 224. As a consequence, no more than three magazines (including appellant's general interest magazine, *Arkansas Times*), were actually paying Arkansas tax. *Id.* at 229 n. 4. This Court held that this scheme constituted differential taxation of the second type condemned by *Minneapolis Star*— and was even more constitutionally repugnant because the distinctions among publications were content-based. 481 U.S. at 229. *See also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 26 (1989) (White, J., concurring in the judgment); *id.* at 26 (Blackmun and O'Connor, JJ., concurring in the judgment).

The prohibition against content-based regulation was applicable in *Arkansas Writers' Project*, the Court noted, even though the regulation there tended to restrict entire topics of public discussion rather than particular *viewpoints* on those topics.

> "Nor are the requirements of the First Amendment avoided by the fact that Arkansas grants an exemption to other members of the media that might publish discussions of the various subjects contained in Arkansas Times. For example, exempting *newspapers* from the tax does not change the fact that the State discriminates in determining the tax status of *magazines* published in Arkansas. 'It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him.' *Regan*

> *v. Taxation With Representation of Washington*, 461 U.S. 540, 553 (1983) (Blackmun, J., concurring)."

Arkansas Writers' Project, 481 U.S. at 230-31 (emphasis in original) (statutory citation omitted).

As we will show, the single most common distinction among press entities for state taxation purposes— the taxation of magazines and tax exemption of newspapers— is *inevitably* content-based. Because this is so, differential taxation between newspapers, on the one hand, and magazines, on the other, cannot be sustained.[4]

Once a state undertakes to officially distinguish between, and classify, types of periodicals, content-based distinctions can hardly be avoided. Thus, an authoritative dictionary defines a "newspaper" as a publication that

> "*contains* news, articles of opinion (as editorials), features, advertising or other matter regarded as of current interest."

The same source further defines a "magazine" as a periodical that *contains* either,

> "a miscellaneous collection of articles, stories, poems, and pictures and is directed at the general reading public,"

or,

> "specific material directed at a group having a particular hobby, interest or profession (as education, photography or medicine) or at a particular age group (as children, teen-agers)."

Webster's Third New International Dictionary of the English Language Unabridged (1966) (emphasis added).

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[4]This argument was briefly raised, but not addressed, in *Arkansas Writers' Project*. 481 U.S. at 232-33.

While those wishing to determine whether a given publication is or is not a magazine may think they "know it when they see it," any serious analysis of this question must inevitably turn to the publication's *content*. Publications close to the "newspaper"/"magazine" line, such as Dow Jones' own *Barron's*, or *The Sporting News* or *The Village Voice*, should be sufficient on inspection to demonstrate this point.

In addition, many of the states that exempt "newspapers" from sales tax while continuing to tax magazines exclude "trade journals" or the like from the definition of newspapers. "Trade journals," the regulations almost invariably provide, are too "specialized"; they lack sufficient news of "general interest," or of interest to the "general public" to qualify for the newspaper tax exemption. Such "specialized" publications, if they wish to be tax-exempt, must contain as well "general news of the day." See Colo. Rev. Stat. §24-70-102, Reg. 34; Conn. Sales and Use Tax Manual, §20.6; D.C. Reg. §452.1; Ind. Admin. Code Tit. 45, r. 2.2-5-26; N.M. Gross Receipts Reg. 64:1; S.C. Reg. 117-174.166(3); Utah Admin. R. 865-19-655(A)(2); Wash. Admin. Code §458-20-143[5]; Wis. Stat. §77.51(8). Without doubt, this is content-based discrimination, and therefore "particularly repugnant" under *Arkansas Writers' Project*. *See also Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)("A determination concerning the newsworthiness [of a publication]... cannot help but be based on the content.... Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1975).

One state's treatment of the matter is illustrative. Connecticut has gone to the greatest pains to articulate the

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[5]Washington's Department of Revenue has announced its intention to amend this provision, but noted: "There has been no change in the position of the department that current events or news be the primary focus of the publication." Wash. Dep't of Rev., Excise Tax Rev. Policy Mem. No. 89-5 (Oct. 24, 1989).

distinction between newspapers (non-taxable) and magazines (taxable when sold at newsstands). The State's Sales and Use Tax Manual not only defines the statutory terms, but also lists each specific publication as to the status of which the Department of Revenue Services has ruled. Exempt "newspapers" include *Barron's, The Irish Echo, The Sporting News* and *The Village Voice.* With respect to certain "graphic publications," however, including *The National Enquirer* and *The Star,* no such exemption is available:

> "They do not contain reports of current events, current happenings and news of general and current interest but simply stories, articles, photographs, etc. designed for the entertainment for [sic] the general reader.
> "Although they have a newspaper format and appearance, *their contents and substance indicate they are magazines and not newspapers.*"

Conn. Sales and Use Tax Manual, §20.6 at 2 (emphasis added).[6]

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[6]In addition, because "magazine" *subscriptions* are not taxed in Connecticut, the State further classifies non-newspapers into "magazines" and other publications, the sale of which by subscription are taxable. The Sales and Use Tax Manual provides that "Professional Journals" and "Personal service publications" are not "magazines" because the latter are defined as "containing miscellaneous papers, critical and descriptive articles, stories, poems, etc. designed for the entertainment of the general reader." Conn. Sales and Use Tax Manual §20.6 at 2. The resulting classification is at once content-based and arbitrary, as the following examples illustrate:

"Magazines"	Not "Magazines"
Forbes	American Banker
Electrical World	Public Utility Fortnightly
Harvard Business Review	Connecticut Business Journal
Medical World News	Hospitals
Oil & Gas Journal	Chemical Monthly Reporter
Scientific American	Environmental Science & Technology

Id. at 3-4.

Judicial attempts to define "newspapers" and "magazines" in the context of differential taxation reveal the same sort of content-based distinctions. Most recently, the Supreme Court of Iowa considered a challenge by the publisher of 14 large-circulation magazines to the State's taxation of them while other publications were exempt. *Hearst Corp. v. Iowa Department of Revenue and Finance*, ___ N.W.2d ___ (Iowa Sept. 19, 1990).

The plaintiff-taxpayer's magazines, it pointed out, met all of the statutory "noncontent criteria" of the newspaper exemption. The Iowa Court did not deny this; instead, it noted cryptically:

> "We observe that although a publication may contain some of the noncontent criteria that distinguish a 'newspaper' from other publications that are taxable, it may still not qualify under the 'newspaper' exemption."

Hearst Corp., Slip op. at 9-10.[7] *See also, e.g., Jaguar Publications, Inc. v. Comptroller of the Treasury*, Md. Tax Rpts. (CCH) ¶ 201-328 (Md. Tax Ct. 1989) (holding a weekly "T.V. guide" an exempt newspaper because of its one-week "shelf life," and observing that "format alone is insufficient for classification."); *Aetna Adjustment Co. v. Washington Department of Revenue*, Wash. Tax Rpts. (CCH)¶ 201-150 (Wash. Bd. Tax App. 1975) (specialized daily publication held not a newspaper, and therefore taxable: "This information, although current, is not of general interest. The majority of subscribers are from six business classifications; subscription is based on a business interest in the recorded information.")

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[7]Conceding that "classification of the writing as news, articles of opinion," etc., *i.e.*, content analysis, "is a consideration" under Iowa's scheme, the court held that the rule of *Arkansas Writers Project* was avoided because, "the focus is not on the content of the journalism." *Hearst Corp.*, Slip op. at 17. In other words, while content-based discrimination is "particularly repugnant," a little content analysis should be acceptable. That is simply not the law.

Indeed, a number of the courts that have considered recent challenges to differential taxation of newspapers and magazines have recognized the content-based nature of this discrimination. *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247, 249 (Tenn. 1990), *cert. pending sub nom Commissioner of Revenue of Tennessee v. Newsweek, Inc.*, No. 90-273 (newspaper exemption requiring that publication "must contain matters of general interest and reports of current events... is not a content-neutral requirement"); *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900, 906 (La. App. 1987) (rejecting regulations defining "newspaper" as resulting in discrimination based on "the content of the publication"). *See also Hearst Corp. v. Director of Revenue*, 779 S.W.2d 557, 559 (Mo. 1989) (Blackmar, C.J., dissenting) (sales tax on magazines but not newspapers "would discriminate between different kinds of print media by reason of their content, and so would violate the Constitution of the United States.")

As this Court held in *Arkansas Writers' Project*, such content-based schemes of taxation have no place in a system of government bound by the First Amendment.

III.

THE PERSUASIVE WEIGHT OF AUTHORITY IN THE STATE COURTS HAS FOLLOWED THIS COURT IN FINDING DIFFERENTIAL TAXATION OF PRESS ENTITIES CONSTITUTIONALLY SUSPECT.

In Point I we argued that the language and logic of *Minneapolis Star* and *Arkansas Writers' Project* compel the conclusion that a sales tax scheme which distinguishes between different types of periodicals is constitutionally suspect as applied to the press. Nearly all of the state courts that have considered the point agree. The issue was posed squarely in *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (La. App. 1987). In that case, the publisher of a bi-monthly magazine challenged a sales tax scheme from which newspapers, but not magazines, were exempted. The court upheld the challenge, declaring that,

> "An exemption which exempts some publications but not all publications constitutes an infringement of First and Fourteenth Amendment rights."

Id. at 902. It refused to permit the legislature to select "who may exercise First Amendment rights free of taxation, and who may not." *Id.* at 905.

In *Dow Jones & Co. v. Oklahoma ex rel. Oklahoma Tax Commission*, 787 P.2d 843 (Okla. 1990), the Supreme Court of Oklahoma agreed, holding that

> "a use tax levy on some but not all publications— based on sales price or mode of delivery— is an impermissible burden on rights protected by the First Amendment to the U.S. Constitution."

787 P.2d at 843. Oklahoma had exempted from a generally-applicable sales tax newspapers and periodicals sold by carrier as well as sales "where any individual transaction does not exceed seventy-five cents."

The Oklahoma court followed up on its ruling in *Dow Jones* in *Oklahoma Broadcasters Ass'n v. Oklahoma Tax Commission*, 789 P.2d 1312 (Okla. 1990), by striking down three taxes imposed on the broadcast press. The court invalidated taxes on:

- television broadcasters' revenues from licensing agreements— because newspapers' and radio broadcasters' revenues from similar agreements were exempt;

- broadcasters' advertising revenues— because newspaper, magazine and billboard advertising revenue was exempt;

- sales of broadcasting equipment— because most "manufacturing" equipment, including that used in the production of newspapers, was exempt.

Id. at 1314-15. Broadening its holding in *Dow Jones*, the Oklahoma court stated that,

> "a tax structure that exempts some but not all 'members' of the press from use and sales taxes impermissibly burdens rights protected by the First and Fourteenth Amendments to the United States Constitution."

Oklahoma Broadcasters, 789 P.2d at 1313.

Recently, the New York Court of Appeals summarily affirmed an intermediate appellate court opinion invalidating a state franchise tax levy because it was being applied in a manner more favorable to broadcasters than

print publishers. *Matter of McGraw-Hill, Inc. v. State Tax Commission*, 146 A.D.2d 371, 541 N.Y.S.2d 252 (3d Dep't 1989), *aff'd on opinion below*, 75 N.Y.2d 852, 552 N.Y.S.2d 915 (1990).

The decision of the court below is, of course, directly to the contrary. Indicating it was unaware of the earlier decisions by the New York Court of Appeals in *McGraw-Hill* and the Oklahoma District Court in *Oklahoma Broadcasters*, the Arkansas court refused to find that

> "the failure to tax newspapers in the same manner as radio broadcasts violates the First Amendment.... [W]e are unwilling to hold that all mass communications media must be taxed in the same way.... We must, however, hold that a tax which discriminates between mass communicators delivering substantially the same service runs afoul of the First Amendment."

Medlock v. Pledger, 301 Ark. 483, 487, 785 S.W.2d 202, 204 (1990). App. 7a.[8]

In just the few months since the decision below, the Supreme Court of Tennessee held in two cases that exempting newspapers but not magazines from the State's use tax violated the free press guarantees of both the federal and Tennessee Constitutions. *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. 1990), *cert. pending sub nom*

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[8]While this Brief does not directly address the issue of differential taxation involving regulated media, one difficulty of the approach taken by the court below, confining the rule of *Arkansas Writers' Project* to "mass communicators delivering substantially the same service", is that while the Arkansas court may consider satellite and cable television to come within such a rule, another court could view newspapers and magazines (in many ways, even more similar products) as "media sources of different types." *Hearst Corp. v. Iowa Department of Revenue and Finance*, ___ N.W.2d ___ (Iowa Sept. 19, 1990), Slip op. at 12. As pointed out above, to elevate such distinctions to constitutional magnitude is to invite the very sort of content-based discrimination that this Court has already declared to be "particularly repugnant." *Arkansas Writers' Project*, 481 U.S. at 229. *See* Pt. II, *supra*. *See also Finlator v. Powers*, 902 F.2d 1158, 1163 (4th Cir. 1990).

Commissioner of Revenue of Tennessee v. Newsweek, Inc., No. 90-273; *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251 (Tenn. 1990), *cert. pending sub nom Commissioner of Revenue of Tennessee v. Newsweek, Inc.*, No. 90-273.

In *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d 1304 (Fla. 1990), the Supreme Court of Florida as well declared that a statutory scheme taxing the retail sale of secular magazines but not of newspapers was unconstitutional:

> "*Ragland* clearly indicates that a state may not tax some types of magazines while exempting other types of magazines. The same first amendment concerns are present when a state tax scheme differentiates between different types of periodicals."

565 So.2d at 1307.

Finally, *Hearst Corp. v. Iowa Department of Revenue and Finance*, ___ N.W.2d ___ (Iowa Sept. 19, 1990), the most recent decision in this area, is to the contrary. But the Iowa court's analysis focused almost exclusively on the first prong of *Minneapolis Star*— special taxes on the press (of which the Iowa sales tax, exempting newspapers but not magazines from an otherwise generally-applicable tax, was certainly not one)— while largely neglecting the second prong: differential taxation among the press. Slip op. at 14-15. *Cf. Arkansas Writers' Project*, 481 U.S. at 228-29 (noting that State's arguments "address[ed] only the first type of discrimination," while statute failed to pass constitutional muster because of the second); *Village Publishing Corp. v. North Carolina Department of Revenue*, 472 U.S. 1001, 1002-1003 (1985) (White and Brennan, JJ., dissenting from

dismissal of appeal) (criticizing lower court decision which made same analytical error).[9]

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[9]The law on this issue in California is less than clear. *Times Mirror Co. v. City of Los Angeles*, 192 Cal. App. 3d 170, 237 Cal. Rptr. 346 (1987), *app. dism'd*, 484 U.S. 1022 (1988) involved a challenge by newspapers to a gross receipts tax scheme in which the print and broadcast press were treated identically, but where motion picture production was effectively taxed at a lower rate. While the court upheld this differential, it also noted that "those engaged in protected speech may not be singled out for discriminatory tax treatment in the absence of counterbalancing governmental interest of compelling importance that cannot be achieved without differential taxation." 192 Cal. App. 3d at 182-83, 237 Cal. Rptr. at 354. The only exception, according to the *Times Mirror* court, comes where "the tax measure does not result in a discriminatory burdening of First Amendment rights." 192 Cal. App. 3d at 183, 237 Cal. Rptr. at 354. But, of course, in *Minneapolis Star* this Court rejected any inquiry into the effective burden of the challenged tax. 460 U.S. at 589-90.

Adding substantially to the confusion is the fact that *Times Mirror* cited with approval but distinguished its sister court's decision in *City of Alameda v. Premier Communications Network, Inc.* 156 Cal. App. 3d 148, 202 Cal. Rptr. 684, *cert. denied*, 469 U.S. 1073 (1984). In *Premier Communications*, the court had invalidated a business license tax assessment that discriminated against Home Box Office because it was "unjustified by any compelling interest of the City." 156 Cal. App. 3d at 157, 202 Cal. Rptr. at 689. The *Times Mirror* court found the distinction between the business license tax in *Premier Communications* and a gross receipts tax (such as the one before it) significant because the former "grant[s] or take[s] away any right to do business." 192 Cal. App. 3d at 182, 237 Cal. Rptr. at 353. While it may be true that a tax "taking away any right to do business" in the First Amendment context constitutes an unconstitutional prior restraint, *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 694 (1990); *Minneapolis Star*, 460 U.S. at 586 n. 9, that does not make differential sales or use taxation constitutional. Indeed, the entire thrust of *Minneapolis Star* and *Arkansas Writers' Project* is to the contrary.

IV.

WHERE, AS HERE, THERE IS NO COMPELLING STATE INTEREST TO SUSTAIN IT, DIFFERENTIAL TAXATION OF THE PRESS MUST BE STRUCK DOWN.

Differential taxation among press entities is, of course, not altogether forbidden by *Minneapolis Star* and *Arkansas Writers' Project*. Rather, in order to sustain such a tax, a state must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation," *Minneapolis Star*, 460 U.S. at 585, and must demonstrate that the tax "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project*, 481 U.S. at 231. *See also id.* at 235 (Stevens, J., concurring in part and in the judgment).

In *Minneapolis Star* this Court rejected two possible justifications for such taxation: the State's need for revenue, 460 U.S. at 586, and the desire for what Minnesota called an "equitable" tax system, placing the burden on large (although, as the Court pointed out, not necessarily more profitable) taxpayers. *Id.* at 591-92. The Court did not indicate what sort of rationale might meet its "compelling interest" test.

The *Arkansas Writers' Project* Court rejected a number of rationales proffered by the State in an attempt to meet *Minneapolis Star's* "compelling interest" test: not only the need to raise revenue, 481 U.S. at 231-32, but also a purported intent to encourage "fledgling" publishers, as well as the need to "foster communication" in Arkansas. *Id.* at 232.

The state courts have also considered— and rejected, *seriatim*— a host of "compelling interests" proffered in support of differential taxation of the press. In ruling in *Dow Jones* that the State had failed to meet its burden of

showing a compelling interest to justify the tax, the Oklahoma Supreme Court held,

> "a state's stake in orderly administration and efficient tax collection is not an interest separate and distinct from that in raising revenue. A convenient, problem-free collection system is merely the means to achieve the primary objective of raising funds."

Id. at 847. *Cf. Matter of Assessment Against Village Publishing Corp.*, 312 N.C. 211, 322 S.E.2d 155, 161-63 (1984), *app. dism'd sub nom Village Publishing Corp. v. North Carolina Department of Revenue*, 472 U.S. 1001 (1985) (upholding, after "rational basis" scrutiny, statute exempting sales of newspapers delivered by carrier or sold at newsstands, but not otherwise).

The Tennessee Supreme Court rejected that State's argument that a compelling governmental interest could be found in the "immediate provision of news," which, the State averred, was better advanced by newspapers than magazines:

> "There is nothing to suggest that newspapers require an exemption in order to furnish such immediacy in bringing the news to the public. Further, there is no basis for giving immediate news a privileged position over other avenues of news reporting which is accompanied by more deliberative analysis or commentary. *It is not a legitimate function of the government to decide which information furthers better the public interest.*"

Newsweek, Inc., 789 S.W.2d at 250 (emphasis added); *Southern Living, Inc.*, 789 S.W.2d at 253 (emphasis added). Similarly, an asserted public interest in "promoting publishers who engage in the immediate dissemination of news; in publishing news while it is new," was rejected by the Florida Supreme Court as not compelling, and possibly not even a rational basis. *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d at 1308.

Finally, turning to the cases most closely analogous to this one, among the rationales held by the Oklahoma Supreme Court not to constitute a "compelling state interest" was the "higher degree of regulation" of the broadcast as opposed to the print media. *Oklahoma Broadcasters*, 789 P.2d at 1317. In New York, the intermediate court in *McGraw-Hill* said,

> "Respondent claims that the unique nature of the electronic [i.e., broadcast] media makes it more susceptible to governmental regulation and that there are many differences between the print and visual media. While that may be true, such an argument fails to show any compelling State interest in taxing the two types of media differently. Thus, the regulation must fall."

146 A.D.2d at 375, 541 N.Y.S.2d at 255 (citations omitted).

While it is, again, not the principal focus of this Brief, the point made in *McGraw-Hill* is precisely applicable in the instant case: the fact that certain news media may be more susceptible of governmental regulation, *e.g.*, with respect to scarce frequencies or the use of public rights of way, does not demonstrate a compelling interest in their services being taxed differently. No such showing of a compelling interest has been made here by the State of Arkansas.[10]

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[10]The Arkansas court did not, in fact, even undertake a compelling interest analysis, holding simply that discrimination between, for instance, newspapers and radio, was outside of the rule of *Minneapolis Star* and *Arkansas Writers' Project*. *Medlock v. Pledger*, 301 Ark. 483, 486-87, 785 S.W.2d 202, 204 (1990). App. 7a. Nor does Respondent in this Court seem to offer a "compelling interest" justification for this tax scheme. *See* Brief in Opposition to Petition for Writ of Certiorari at 2 ("This legislation, when viewed under the 'rational basis' test, survives this constitutional challenge.")

CONCLUSION

Justice Robert H. Jackson, in a passage cited in *Minneapolis Star*, once wrote:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring), cited in *Minneapolis Star*, 460 U.S. at 585. Nowhere, of course, does this hold more true than when, as here, a fundamental right is at stake.

For these reasons, and those set forth above, *amicus curiae* Dow Jones & Company, Inc. respectfully submits that the free press guarantee of the First Amendment

mandates that the decision below of the Supreme Court of Arkansas be reversed to the extent it approved taxation of petitioners-taxpayers from and after July 1, 1989.

Dated: November 14, 1990

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY and the ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers,

Petitioners,

v.

JAMES C. PLEDGER,
COMMISSIONER OF REVENUES, *et al.*,

Respondents,

CITY OF FAYETTEVILLE, ARKANSAS,

Intervenor.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF AMICUS CURIAE OF NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The National Cable Television Association, Inc. ("NCTA"), a non-profit corporation, is the principal trade association representing cable television operators in the United States. Its members operate cable systems serving approximately 90 percent of the country's more than 50

million cable television subscribers. This case requires the Court to address the constitutionality of a taxation system that places special burdens on cable television. This issue is of great concern to the NCTA and its members.

SUMMARY OF ARGUMENT

When a state imposes taxes that favor one medium of communications over another, it raises problems at the heart of the First Amendment. The court below acknowledged as much, in holding that cable television services could not constitutionally be burdened with higher taxes than satellite television services. The court erred, however, by failing to give full application to the general requirement that a state not discriminate against a particular communications medium without a strong justification.

It is now beyond dispute that cable television engages in activities protected by the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). In providing a wide variety of information and entertainment programs, it performs a function essentially indistinguishable from that of such traditional media as newspapers and magazines. Like the editor of a publication, a cable operator must determine what material to offer on its service. To carry out that function, a cable operator not only selects from scores of cable program services, but it offers original programming as well, including programming concerning events of purely local interest. Well over half of Americans with televisions now rely on cable, and the audience for programming provided exclusively on cable now rivals that for broadcast programming. As a consequence, cable operators vie with the older media for advertising dollars and viewers. In short, cable plays a major role in the contemporary marketplace for speech.

This Court has several times recognized that singling out members of the media for special tax burdens raises

serious constitutional concerns. *See, e.g., Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Rooted in the Framers' concern with the "taxes on knowledge" that burdened the English and colonial press, the constitutional presumption against discriminatory press taxes rests in part on the likelihood of an underlying censorial motive, but the direct effect of such taxes—selective inhibition of free speech—is such as to warrant strict scrutiny even in the absence of such a motive. *Minneapolis Star*, 460 U.S. at 585. Although *Arkansas Writers' Project* involved content discrimination, and *Minneapolis Star* involved a tax that applied only to the press, the principles of those decisions extend beyond cases in which the state singles out for special burdens the press as a whole or a select group within a particular branch of the press. The same First Amendment concerns demand, at a minimum, that a state have a strong justification whenever it treats a particular medium of communications differently from others. Such tax treatment might reflect hostility to protected speech that is characteristic of that medium. More generally, by creating classes of favored and disfavored media, the state may diminish the vigor and independence not only of the disfavored class, but also of the favored one, since the former group stands as an example to the latter.

In view of these considerations, the State here must show a strong, if not a compelling, interest to justify its sales tax, which discriminates both between cable and other service businesses and between cable and other communications media. There is no such interest in this case. Although cable television is distinguishable in some ways from other media, its distinguishing characteristics have no relationship to the differential tax burdens here at issue. The Arkansas tax therefore violates the First Amendment.

ARGUMENT

Because of the relative youth of cable television as a medium of expression, this Court has had little occasion to address directly its place in the marketplace for speech.[1] The State of Arkansas, by subjecting cable to differential taxation and arguing that it is not comparable to more traditional communications media, has brought into focus one particular aspect of the question whether this new medium is entitled to the full protections of the First Amendment. To address this question, we first discuss the nature of cable television and its similarities to traditional media, as well as the possible significance of the differences between it and other media. We then examine the strict standard to be applied to taxes that discriminate against and among media, and the history and policies that undergird that standard. Finally, we discuss the insubstantiality of the State's possible justifications for its discriminatory tax.

I. CABLE TELEVISION ENGAGES IN COMMUNICATIONS ACTIVITIES THAT ARE FULLY PROTECTED BY THE FIRST AMENDMENT

The core activities of cable television—that is, providing news, information, and entertainment to its subscribers—"plainly implicate First Amendment interests." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). At the same time, the existence of First Amendment protections for cable speech

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[1] Some of the Court's earlier discussions of cable television are now outdated as a result of changes in the cable industry. *See, e.g., Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399 (1968) ("Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals . . . ."); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 163 (1968) (viewing "principal function" of cable systems as "the importation of distant [broadcast] signals"). Because of the proliferation of cable channels, including both national services and locally originated programs, such descriptions are not accurate today. *See* Part I(A), *infra*.

"does not end the inquiry" regarding the validity of a particular regulatory burden. *Id.* at 495. Especially in view of the State's unexplained contention that cable television "is of a character completely dissimilar to the press," No. 90-38 Br. in Opp. 8, an examination of the nature of cable is a useful starting point for an inquiry into the validity of the tax at issue here. *See also Preferred*, 476 U.S. at 496 (Blackmun, J., concurring) (noting lack of "information about the nature of cable television").

A. With Respect to Its Activities in the Marketplace for Speech, Cable Television Is Like Any Other Medium of Mass Communication

"[T]he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary"; these principles "make freedom of expression the rule." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). In general, the First Amendment protects without differentiation every method of communication that serves as "a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). Thus the Constitution treats pamphlets and leaflets with the same concern as newspapers and magazines. *Ibid. See also Mills v. Alabama*, 384 U.S. 214, 219 (1966). This evenhanded approach is justified by the fact that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). The basic protections of the First Amendment therefore extend to the speech activities characteristic of cable television.

While cable television, as a separate "medium," is unique in terms of its technology, as a participant in the marketplace for speech it engages in activities in many ways indistinguishable from those of such traditional communications media as newspapers and magazines. *See Preferred*, 476 U.S. at 494. Cable system

operators in Arkansas seek to provide programming that covers "a wide variety of topics and formats, including regular news and entertainment programming," as the trial court below found. Pet. App. 14a.[2] The same is true of cable operators across the country. As a provider of information and entertainment, cable functions much like a traditional general interest publication.

Like the editors of a daily newspaper or general interest magazine, cable operators "exercise 'a significant amount of editorial discretion regarding what their programming will include.'" *Preferred*, 476 U.S. at 494 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979)). Roughly 90 percent of all cable subscribers are served by cable systems offering 30 or more different channels. Federal Communications Commission, Report, MM Docket No. 89-600, at 5 (July 1990) (hereinafter "*FCC Report*"). Cable operators fill these channels with programming from a wide variety of potential sources, including not only local and distant broadcast stations, but also dozens of program services produced specifically for cable television. *See* Nat'l Tel. & Inf. Admin., U.S. Dep't of Commerce, *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations* at 8 (June 1988) (hereinafter "*NTIA Report*"). Editorial choices made by cable operators regarding these sources are unavoidable, because not all the sources can be carried on a typical cable system. *See id.* at i.[3] *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (scarcity necessitates editorial decision making).

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in the present case.

[3] Indeed, in the last few years, the importance of the editorial role of cable operators has been increasing. "Cable has shifted from its early role as a broadcast antenna service focused on facilities, to an original programming service . . . ." *NTIA Report* at i.

For example, in addition to area broadcast stations, more than forty-six different cable channels are carried by the various cable systems serving the Baltimore-Washington, D.C. area. *See* Washington Post, TV Week, Nov. 4, 1990 at 47.[4] These channels, like the sections of a daily newspaper, cover a wide variety of subjects, including news (such as Cable News Network, CNBC (Consumer News and Business Channel), Associated Press, and Financial News Network), weather (Radar Weather, Weather Channel), public affairs (C-SPAN, C-SPAN II, Local Government), sports (ESPN, Home Team Sports, Sports Tracker), children's programming (Disney Channel, Nickelodeon), education and travel (Learning Channel, Discovery, Travel Channel), women and minorities (Lifetime, Black Entertainment Television Network, Univision (Spanish language)), shopping (QVC), and religion (Inspirational Network, Trinity Broadcasting Network), as well as many channels devoted to movies (American Movie Classics, Cinemax, The Movie Channel, Showtime), the performing arts (Bravo, Arts & Entertainment), various types of popular music (MTV, Country Music Television, Video Hits-1), and other entertainment (HBO, The Family Channel). *Ibid.* The list of available program sources is constantly expanding. *See NTIA Report* at 11 (charting rise in number of cable networks up to 1987, when there were a total of 65).

Moreover, like newspapers and magazines, cable operators produce and distribute original material, including material of specifically local interest. *See Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 403-04 & n.8 (1974). *Cf. FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979) (former local origination rule involved activities "comparable to [those of] television broadcasters"). Indeed, for some time cable has offered local programming with a level of imme-

[4] The prospectuses of these cable systems reveal that they offer a number of stations not listed in the Washington Post.

diacy and detail that the traditional media do not match. *See* "Cable News Hits the Small Time," *Columbia Journalism Review* at 35 (Sept./Oct. 1982). For example, the trial court below, in describing some of the local programming distributed by Arkansas cable operators, found that the operators offered not only "a variety of entertainment programming" but such programs as "agricultural service reports, policy commentary on the State Legislature's activities, industrial incentive programming and educational training," as well as coverage of "City Council and school board meetings, [and] the local high school football games." Pet. App. 14a.

The Arkansas programming is by no means unique. The amount of local news provided by cable operators is rapidly increasing nationwide. "Cable Does Local News," *Cable tv Business* at 27 (Sept. 15, 1990). A leading example is News 12 Long Island, a 24-hour cable news channel specializing in local news, which is produced by a Long Island cable system and received by 535,000 homes. *See* Newsday, Feb. 23, 1988 (Nassau and Suffolk Ed.) Pt. II, at 3. The success of News 12 has inspired a new 24-hour news channel on cable television in Orange County, California, and all-news channels are being planned in New England, New Jersey, Westchester County, New York, and Fairfield County, Connecticut. N.Y. Times, April 16, 1990, at 33; Electronic Media, Nov. 5, 1990, at 1. Moreover, dozens of cable operators insert local news in Turner Broadcasting's Local Edition, a local news segment on CNN Headline News. "Cable Does Local News," *Cable tv Business* at 29.

The "numerous new programming services and original programs" offered by cable have resulted in "substantially greater viewing choices to the American public." *FCC Report* at 5. The significance of this development is underscored by reference to the size of the audience that cable serves—an estimated 54,235,200 house-

holds, or 58.9 percent of all households with television. National Cable Television Association, *Cable Television Developments* at 1-A (Oct. 1990) (hereinafter "*NCTA Report*").[5] And cable service is now *available* to "about 90 percent of Americans." *FCC Report* at 5.

A further indication of the close parallels, for First Amendment purposes, between cable television and more traditional media is the actual competition between cable and other media. The most obvious competition, both for viewers and advertisers, is between cable and broadcast television. This competition is not of recent origin; the now-defunct "must carry" regulations that required cable systems to carry local broadcast stations were based largely on the policy of protecting broadcast television. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 175-77 (1968); *Century Communications Corp. v. FCC*, 835 F.2d 292, 293-94 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1439, 1441 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). In recent years, cable has made significant gains; "overall audience ratings for basic cable programming services have doubled since 1984, now exceeding, on average, the total all-day audience share of any major television network affiliate." *FCC Report* at 6. Advertisers are attracted to cable not only by successful programming, but also by the fact that cable systems allow some local advertisers to reach potential customers in their areas more economically than does broadcast television. *See* Newsday, Feb. 23, 1988 (Nassau and Suffolk Ed.) Pt. II, at 3. *See also* Paul Kagan Associates, Cable TV Advertising at 1 (April 26, 1990) (estimating value of advertising sold by local cable operators in 1989 at $496 million).

There is also significant competition between cable and other media, such as newspapers. *See* N.Y. Times, May

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[5] This estimate was derived from data from the A.C. Nielson Company for July 1990. Other sources suggest percentages of cable households at 56 percent and 58.1 percent. *NCTA Report* at 1-A.

27, 1990, § 12LI, at 3, col. 1 ("Cablevision and Newsday are on the verge of a media war."). Quite apart from the more general competition between newspapers and cable as alternative sources of entertainment and information, the expansion by cable systems of their local news coverage exerts pressure on local newspapers that is likely to "change the way the local paper covers the area." "Cable Does Local News," *Cable tv Business* at 28 (quoting source).[6] The potential for newspaper-cable competition is reflected in the fact that local newspapers have seen fit to cooperate with some cable operators in the offering of local news programs. *Id.* at 28-29. *See also* N.Y. Times, April 16, 1990, at 33 (new all-news cable channel in Orange County, California, "intensifies the competition between Freedom Newspapers Inc. [owner of the cable channel] and the Times Mirror Company"). *Cf. Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (newspaper attempted to eliminate competition for advertising from radio broadcaster).

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). In view of the breadth and volume of speech offered by cable television, it is clear that cable is now one of the "diverse and antagonistic sources" that contributes to the First Amendment marketplace. Cable is, of course, comparable in certain respects to subscription satellite

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[6] A recent national poll indicated that significantly more people rely on television as their primary source of news than rely on newspapers. Times Mirror Center for the People and the Press, *The American Media: Who Reads, Who Watches, Who Listens, Who Cares* (July 15, 1990) (based on three separate sets of interviews in early 1990, each with more than 1200 persons, 20 percent more people regularly watch news on television than regularly read a daily newspaper). This same poll found that 52 percent of the subjects at least sometimes watch CNN (Cable News Network). *Id.* at 40.

television, as the Arkansas Supreme Court found, but for constitutional purposes it also bears comparison to established media, including newspapers and magazines. As a young and robust competitor in the marketplace for speech, cable television is entitled to full constitutional protection for its speech activities.

B. The Force of the First Amendment Protections Covering Cable Television Is Not Diminished by the Fact That Cable Is Distinguishable From Other Communications Media

Despite the similarities between cable television and other communications media, it is of course true that cable —which delivers programming through cables frequently using public rights-of-way—is not identical to any other medium. This lack of identity, however, proves only that cable is a medium distinguishable from other media, just as newspapers are distinct from magazines and radio from broadcast television; it does not by itself suggest limitations on First Amendment protections. At the same time, while "the basic principles of freedom of speech and the press . . . do not vary," each medium of communication "tends to present its own peculiar problems." *Joseph Burstyn, Inc.*, 343 U.S. at 503. And the analysis of justifications for regulatory responses to such peculiar problems is sometimes referred to in terms of "differences in the First Amendment standards" to be applied. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).

Because the State has argued that cable television's distinctive identity is sufficient to lessen its First Amendment protections, it is important to be clear about what "differences in . . . First Amendment standards" does and does not mean in the present context. The constitutionality of a particular regulation must always be eval-

uated with reference to the "peculiar problem" addressed by the regulation. Put another way, for a "difference" in regulation among media to be legitimate, it must be based upon a relevant "difference" among the media themselves. Thus, for example, it is perfectly appropriate for a state to respond to the peculiar problems of sound trucks by restricting their noise levels. *Red Lion*, 395 U.S. at 387 (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)). This does not mean, however, that merely pointing out the essential nature of sound trucks would be sufficient to justify any and all regulation. Only measures specifically tied to the peculiar problems presented by sound trucks are justified by reference to the uniqueness of that medium.

Similarly, this Court has held that the peculiar problems of broadcasting justify regulations that would raise serious constitutional difficulties if applied to other media. Because "there are substantially more individuals who want to broadcast than there are frequencies to allocate," governmental allocation of frequencies is necessary to protect and further effective communication. *Red Lion*, 395 U.S. at 388. The Court in *Red Lion* held that this scarcity of frequencies supported the FCC's fairness doctrine. At the same time, however, the Court indicated that the scarcity rationale could not justify regulations with no logical connection to it, such as censorship of programs or requirements that discriminate among licensees. *Id.* at 396. *See also FCC v. League of Women Voters*, 468 U.S. 364 (1984) (invalidating ban on political editorials by public broadcasting stations, after close scrutiny of government's proposed justifications).[7]

In short, the fact that one medium is different from another does not mean that, with regard to any particular regulation, it is entitled to a different (or lesser) degree of First Amendment protection. It is obviously

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[7] In *League of Women Voters*, 468 U.S. at 376 n.11, the Court took note of the possible obsolescence of the scarcity rationale, but declined to reconsider the rationale at that time.

possible to distinguish between outdoor and indoor movie theatres, between live theatrical productions and movies, between cable and newspapers—in fact, between any one medium of communication protected by the First Amendment and any other. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Southeastern Promotions*, 420 U.S. at 557-58; *Joseph Burstyn, Inc.*, 343 U.S. at 503. For First Amendment purposes, however, distinctions between media are irrelevant, unless the distinguishing characteristics of a burdened medium have a logical nexus with a challenged regulation.[8] The special characteristics of cable do not justify burdening it with taxes not imposed on other communications media, as explained in Parts II and III below.

II. TAXATION THAT DIFFERENTIALLY BURDENS COMMUNICATIONS MEDIA VIOLATES THE FIRST AMENDMENT UNLESS JUSTIFIED BY A STRONG GOVERNMENTAL INTEREST

A. Discriminatory taxation of the communications media raises concerns at the core of the First Amendment. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). While it is well accepted that a mass communications business is subject to a generally applicable tax (that is, a tax that treats it like any other business), a tax that discriminates against communications media is "presumptively unconstitutional." *Minneapolis Star*, 460 U.S. at 585. The state attempting to impose such a tax bears a "heavy burden": it must demonstrate that the regulation serves a

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[8] For that reason, of course, the justifications for each type of regulation must be looked at separately. For instance, a state cannot claim that the reasons given for regulating the number of cable operators in a given area—the issue in *Preferred*—suffice to support discriminatory taxation, or vice-versa. Each regulation must stand or fall on its own merits.

strong, if not compelling, governmental interest that cannot be achieved without differential taxation. *See Arkansas Writers' Project*, 481 U.S. at 231; *Minneapolis Star*, 460 U.S. at 582, 585, 592-93.

This requirement stands in sharp contrast to the lenient reasonableness standard that ordinarily applies, absent First Amendment concerns, to challenges to taxes based on principles of equal protection. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 343-44 (1989); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 & n.3 (1973). In general, states are free to tax more heavily those activities that they wish to discourage. *See National Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974). Taxes that discourage specific First Amendment activities, however, raise quite different problems—problems that this Court has found, based on both history and policy, to merit intense scrutiny.[9]

The "taxes on knowledge" imposed by the British government in the Eighteenth Century were a much-hated

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[9] Discriminatory taxes on the media also raise problems quite different from the type of problems that this Court has analyzed under the test of *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* framework was designed for analysis of regulations (not taxes) that are directed at conduct, but have an incidental impact on speech. Discriminatory taxes, however, are not properly regarded as incidental regulations of speech, because they discriminate against speakers as such, not incidentally. *See Minneapolis Star*, 460 U.S. at 585. Because of these problems, close scrutiny for such taxes is warranted. Thus, although the trial court below purported to apply the balancing approach of *O'Brien*, the Arkansas Supreme Court, to the extent it perceived facial discrimination, applied a more demanding standard.

Even if the Court were to find the balancing approach of *O'Brien* applicable to the problem here, however, the approach should be applied with more than usual rigor, because of the special dangers presented by discriminatory taxation. Under this approach, the result in this case would be the same as under the strict scrutiny of *Minneapolis Star*, since the discriminatory sales tax at issue is not tailored to further a substantial governmental interest.

"form of previous restraint upon printed publications" that curtailed circulation of inexpensive publications aimed at mass audiences. *Grosjean*, 297 U.S. at 246, 249. The Framers of the First Amendment were well aware of the struggles both here and in England against these press taxes; indeed, as every schoolchild learns, the British government's taxation of the colonial press was one of the precipitating events of the American Revolution. *See id.* at 246. Although there is no doubt that "freedom of the press" covers direct prior censorship, there is also no doubt that it is not limited to such censorship, which in fact had disappeared from English practice well before the Revolution. *See id.* at 246, 248. *See generally Near v. Minnesota*, 283 U.S. 697, 714-15 (1931). In view of this historical context, "[i]t is . . . impossible to believe that [the First Amendment] was not intended to bring within the reach of these words such modes of restraint as were embodied in [special taxes on the press]." *Grosjean*, 297 U.S. at 248. *See also Minneapolis Star*, 460 U.S. at 583 (noting "substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment").

This Court has treated discriminatory taxes on communications media as "presumptively unconstitutional" because such taxes raise many of the same problems as direct censorship. First, experience has shown that the simple fact of "differential treatment . . . suggests that the goal of the regulation is not unrelated to suppression of expression." *Minneapolis Star*, 460 U.S. at 585. This justifiable suspicion of censorial motive, together with the Court's general caution about inquiries into legislative motive in particular cases (*see United States v. O'Brien*, 391 U.S. 367, 383 (1968)), has warranted a strong prophylactic rule against discriminatory taxes, a rule that generally condemns such discrimination without any need to demonstrate censorial motive on the part of the legislature. *See Arkansas Writers' Project*, 481

U.S. at 228; *Minneapolis Star*, 460 U.S. at 580, 592 ("[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment").

Second, even aside from historically well-founded suspicions about legislative motive, the constitutional presumption against discriminatory taxes on the press is justified by the effect that such taxes have on the communications media and, by extension, on the American democratic system. Special taxation of a communications medium "can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Minneapolis Star*, 460 U.S. at 585. Without a prophylactic rule, the ever-present threat of differential taxation at the hands of (potentially hostile) legislators would have a strong tendency to affect the content of communications: that threat would "dampen the vigor and limit the variety of public debate" as media look over their shoulders at the taxing authorities and seek to obtain or retain favored tax treatment. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 257 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)); *Minneapolis Star*, 460 U.S. at 585. Thus, like censorship, discriminatory press taxes ultimately undermine the function of the press in producing the "informed public [that] is the essence of working democracy." *Minneapolis Star*, 460 U.S. at 585. *See also Mills v. Alabama*, 384 U.S. at 219 (discusssing dangers of censorship with respect to the "constitutionally chosen" role of the press in preventing "abuses of power by governmental officials").

B. In *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project*, the Court, having expressed these First Amendment concerns, established a requirement of strict judicial scrutiny demanding a compelling governmental interest to justify a scheme of differential taxation. Although the taxes specifically at issue in these cases either

involved content discrimination or fell uniquely on the press or certain of its members, thereby making legislative manipulation of the tax (by raising the rate) a ready tool of censorship, the principles of those decisions extend more broadly. *See Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. 1990); *Oklahoma Broadcasters Ass'n v. Oklahoma Tax Comm'n*, 789 P.2d 1312 (Okla. 1990); *McGraw-Hill, Inc. v. State Tax Comm'n*, 146 A.D.2d 371, 541 N.Y.S.2d 252 (App. Div. 1989), *aff'd and adopted*, 75 N.Y.2d 852, 552 N.E.2d 163, 552 N.Y.S.2d 915 (1990); *Louisiana Life Ltd. v. McNamara*, 504 So. 2d 900, 905 (La. App. 1987). Something like strict scrutiny, if not a compelling interest test itself, is necessary to protect First Amendment interests whenever a state's taxing scheme treats different communications media differently, imposing higher tax burdens on some than on others. Of course, in some cases involving a tax generally imposed on non-speakers as well as most media, the threat of censorship may be less direct than in the case of a special tax on the press. But the threat to First Amendment values is nonetheless present whenever a state places selected media in a favored position. Rather than the mere reasonableness test applicable to taxes generally, the First Amendment demands in this context that a state justify any unequal treatment of media by a strong interest closely related to the particular form of discrimination employed.

We believe this is so for several reasons. To begin with, there is a real danger that any singling out of a medium is the product of censorial design, just as with the singling out of a group within a medium, whether by special taxation or exemption. A state imposing a differential tax burden on a particular medium may be covertly either punishing it, based on the content of communications that are characteristic of it, or rewarding the medium's more complaisant competitors. For example, a state might single out cable for harsher taxation based on hostility to its intense coverage of local political

affairs, or to its showing of potentially offensive material (such as "R"-rated movies). Discrimination among media may thus be a form of hidden content discrimination.

Moreover, even when there is no censorial motive, a tax burden placed on one class of media, but not another, has effects that are inconsistent with the First Amendment. Most directly, like any other special tax burden, it will tend to diminish the volume of the disfavored activity—here, subscriptions to cable television. Equally important, differential taxation may skew the speaker's choice of what to say. In singling out one medium for special tax burdens, the state sends a powerful signal to the media currently in favor: any medium that gives cause for offense can be punished. At the same time, the state signals the disfavored class, through the retention of a favored category, that good behavior in the future may be rewarded. In other words, a tax system that discriminates among communications media creates both carrots and sticks precisely directed to achieve an aim at odds with that of the First Amendment: a reduction in the independence and vigor of the press.[10]

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[10] *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (*"TWR"*) does not dispense with special First Amendment inquiry in the present context. (In *TWR*, the Court rejected an equal protection and First Amendment challenge to a tax law that generally denied deductibility to contributions made to lobbying organizations but allowed deduction in the case of veterans' organizations; the effect was to subsidize veterans' lobbying but not lobbying by other groups.) First, *TWR* involved only a government grant of money, not a government exaction or burden from which certain persons were exempt. In the latter situation—like this case but unlike *TWR*—the government has made the disfavored class worse off in an absolute sense than it would be in the absence of the government action. A simple subsidy does not have that effect on the unsubsidized person (like TWR, the non-veteran group) and therefore raises less constitutional concern. *See id.* at 549-50 (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980) (government "need not remove [obstacles] not of its own creation")). Second, and in any event, the relative disadvantage imposed by the tax rules at

More generally, we note that *any* differential taxation brings into play a basic First Amendment concern over government's favoring of particular competitors in the marketplace for speech. *First Nat'l Bank v. Bellotti*, 435 U.S. at 785-86, 790-91; *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). The principle of governmental neutrality serves a function akin to that of antitrust law in protecting competition in economic markets. That is, by preventing states from disfavoring certain communications media, the First Amendment guarantees that competition will be "uninhibited, robust, and wide-open," encouraging the free flow of information that is vital to democracy. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Without good and sufficient reason, the government should not use its powers of taxation to distort the marketplace to the advantage of some and the disadvantage of the rest.

Finally, a sharp departure from the strict scrutiny of *Minneapolis Star*—for taxes that are discriminatory but not uniquely applicable to a single speaker or medium—would make sense only if there were a marked distinction between the category of taxes at issue in *Minneapolis Star* and other taxes treating media differently. There is, however, no such bright line creating separate categories. Taxes may, in form or in effect, range from those applying to only one speaker or medium, to those applying to a defined list of speakers or media, to those applying to all media with exceptions, to those applying to some or all non-media persons or businesses, perhaps with exceptions for designated media. The First Amendment concerns identified in this Court's decisions do not suddenly dis-

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issue in *TWR* could be completely eliminated simply by establishing an affiliate organization. *Id.* at 552-53 (Blackmun, J., concurring). No such option mitigates the effect of the taxation scheme here at issue. Finally, the Court in *TWR* held that a preference for veterans, perhaps uniquely, was justified in view of their service to their country. 461 U.S. at 550-51. There is no comparable justification for the preference here. *See* Section III, *infra*.

appear at some point along this spectrum. The persistence of those concerns throughout the range of differential taxes warrants consistent application of the requirement that the government prove with particularity a countervailing interest that justifies the discrimination.[11]

C. The Arkansas tax on cable discriminates in two ways. First, cable pays a sales tax not paid by non-communications service businesses generally. The sales tax does not cover services generally: besides subscription television, only a handful of services (telephone services, hotel rooms, various repair services, printing, and tickets to entertainments) are subject to the tax. Ark. Stat. Ann. § 26-52-301(3) (1987 & Supp. 1989). Thus, the Arkansas tax lies between the extremes of the taxation spectrum running from a true generally applicable tax to a tax directed with surgical precision at a specific First Amendment speaker, such as the ones at issue in *Minneapolis Star* and *Arkansas Writers' Project*. It is, however, closer to the latter extreme.[12]

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[11] The general rule against disfavoring selected media is not called into question by *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946) and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). The Court there determined that, although newspapers generally were covered by the Fair Labor Standards Act, the FLSA validly exempted certain small newspapers. The Court did not, however, reject the sort of demanding requirement of a countervailing state interest proposed here. Indeed, the Court found the exception for small newspapers to be justified by the governmental interest in placing small newspapers "more on a parity with other small town enterprises." *Mabee*, 327 U.S. at 184. *Accord Oklahoma Press*, 327 U.S. at 194. In other words, the FLSA exception for small newspapers avoided disfavored treatment for those newspapers vis-à-vis similarly situated non-media businesses. Here, Arkansas has not justified its taxation scheme by reference to such a neutral objective.

[12] In *Oklahoma Press Publishing Co. v. Walling*, *supra*, the Court considered a burden lying closer to the "generally applicable" side of the spectrum. Because of the general applicability of the FLSA, and the congressional aim to treat small newspapers like other small businesses for certain entirely speech-neutral purposes, the

Second, the Arkansas tax scheme treats cable more onerously than other communications media. Although tangible personal property is generally subject to the gross receipts tax, sales of all newspapers and of magazines sold by subscription are specifically exempted from the tax. Ark. Stat. Ann. §§ 26-52-301(1), 26-52-401(4), (14) (1987 & Supp. 1989); Revenue Policy Statement 1988-1 (March 10, 1988), *reprinted in* Arkansas Tax Reports ¶ 69-415 (CCH) ("publications, regardless of the type or content of the publication . . . are no longer subject to Arkansas sales or use tax"). Thus the tax plainly discriminates between cable television and members of the printed press.

By imposing its gross receipts tax on cable television, while exempting not only many services but also newspapers and magazines, Arkansas has created a facially discriminatory system. Although it is not possible to ascertain the precise motives of the legislature in passing this tax, or to know the precise effect that the tax will have, this Court has made clear, in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project*, that such an inquiry is unnecessary. The risks of creating a disfavored medium (cable operators) and a favored class (newspapers and magazines) are sufficient to merit imposition of the prophylactic rule here, invalidating this tax scheme unless Arkansas can show a strong, if not compelling, interest justifying the distinction. As explained below, the State cannot satisfy this heavy burden.

III. THERE IS NO STATE INTEREST IN THIS CASE SUFFICIENTLY STRONG TO JUSTIFY THE DIFFERENTIAL TAXATION OF CABLE OPERATORS

For the State's taxation scheme to withstand the proper scrutiny under the First Amendment, the State must demonstrate a strong counterbalancing interest

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Court determined that isolated exemptions for such workers as seamen and farm workers raised no constitutional difficulties. 327 U.S. at 193. *See also Minneapolis Star*, 460 U.S. at 584 n.5.

"that it cannot achieve without differential taxation." *Minneapolis Star*, 460 U.S. at 585. As we have discussed, that requirement demands that the State show not merely that cable is different in certain respects from other media, but that any differences justify the particular discriminatory taxation scheme at issue. *See* pages 11-13, *supra*. In fact, the State cannot do so, for neither the interests identified by Arkansas in this proceeding, nor interests that other courts have found sufficient to justify other types of cable regulations, come close to satisfying the State's burden.

The State's reliance on its interest in raising revenue, No. 90-38 Br. in Opp. 6, is quite plainly insufficient. That interest, of course, can be served "without differential taxation." *Minneapolis Star*, 460 U.S. at 585. The interest in revenue may explain why cable is taxed, but it does not explain why other media are not taxed.

The State has also pointed to cable's "use of the public ways and disruption of public order" as general grounds for special taxation. No. 90-38 Br. in Opp. 8. That basis, however, is not related to the particular taxation scheme at issue. The Arkansas Supreme Court itself so concluded in striking down the scheme's differential treatment of satellite services. Pet. App. 7a-8a. The same conclusion applies to the remaining discrimination (a point that the Arkansas Supreme Court simply failed to address).

It is true that cable operators ordinarily require some use of public rights-of-way to deliver their services.[13] The State, however, cannot argue that these facts justify the special tax imposed here on cable, for two reasons. First, every medium of communications makes some use

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[13] In order to establish a cable system, coaxial cable or optical fiber must be strung from utility poles or run through underground conduits; and although the poles and conduits themselves are often privately owned (by telephone companies, principally), installation and maintenance may involve temporary inconvenience to the public.

of public resources. Newspapers generally make use of public streets and sidewalks to sell their product, either through delivery persons or through mechanical newsracks.[14] Similarly, individual pamphleteers depend on public thoroughfares to reach their intended audience, while broadcasters make use of a different scarce public resource (portions of the electromagnetic spectrum). Cable's use of public resources is not so obviously greater in kind or degree as to distinguish it from other media.

Second, even assuming that the impact of cable television's use of public resources sets it apart from other media, such a distinction has no relation to the sales tax at issue here.[15] This is clear from the fact that Arkansas cable operators have already paid a franchise fee that is ostensibly tied to cable's use of public resources. Thus the Arkansas Supreme Court found, "There was uncontradicted testimony to the effect that a cable television enterprise pays a franchise fee for the use of the right of way." Pet. App. 5a. In view of the prior payments required for the express purpose of providing compensation for the use of public rights-of-way, the State cannot now argue that its strong need for such compensation requires a second tax, especially a *sales* tax that is levied regardless of whether sellers actually use rights-of-way.[16]

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[14] In order to use public rights-of-way for mechanical newsracks, newspapers may be required to pay fees tied to that use and be subject to other regulations. *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (invalidating newsrack permit scheme based on unfettered discretion of licensing authority). Quite plainly, however, the potential validity of such regulation in no way undermines the rule of *Minneapolis Star* barring discriminatory taxation.

[15] While it is possible that cable's particular use of public rights-of-way might provide a justification for certain types of regulation. *see Preferred Communications v. City of Los Angeles*, 754 F.2d 1396, 1406 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986), the regulation must have a nexus with its justification. *See* Part I(B) and note 8, *supra*.

[16] Cable franchise fees raise distinct constitutional problems that federal courts have resolved variously. *Compare, e.g., Century*

The State has further suggested that cable television's "enjoyment of virtually unlimited access to households puts it in a different class than the press." No. 90-38 Br. in Opp. 8. This contention is, at best, mysterious. Cable has "access" to homes in precisely the same way as does the press (or other media) generally—by individual household choice, not by state grant. So, even if "pervasiveness" were a valid basis for more onerous taxation,[17] the State's observation would fail to distinguish cable television from other media.

A few courts, in considering the constitutional validity of regulations other than taxes, have found that cable is distinguishable from other media based on a theory of "natural monopoly." *See Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 717 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1379 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982). Essen-

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Federal, Inc. v. City of Palo Alto, 710 F. Supp. 1559 (N.D. Cal. 1988) (invalidating fee); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987) (same result, based on different reasoning), *with Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987) (sustaining fee), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988). For present purposes, it is sufficient to recognize that the justifications that may support franchise fees are distinguishable from those that may support discriminatory sales taxes. It is unnecessary to resolve in this case the validity of either a franchise fee or the numerous requirements that municipalities may seek to impose with regard to a cable franchise.

[17] The pervasiveness of a medium may be a relevant factor in certain very narrow settings, *see FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding regulations barring broadcasting of indecent material during certain hours); *Sable Communications, Inc. v. FCC*, 109 S. Ct. 2829, 2837 (1989) (describing *Pacifica* as "an emphatically narrow holding"), but it is irrelevant to justifying differential taxation.

tially, these courts have found that the nature of the cable medium is such that only one cable system can successfully operate in a given community. But there are at least three basic difficulties with this approach. First, as a factual matter, the validity of the natural monopoly assumption is subject to genuine doubt. *NTIA Report* at 18-19. Second, mere economic market imperfections would not justify compromising First Amendment protections, as this Court made clear in discussing the problem of a "one newspaper" city. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 248, 251 (invalidating requirement of access to newspaper for candidates wishing to reply to press criticism). The monopoly position of a newspaper plainly will not justify regulation of its First Amendment activity, and there is no reason that a different rule should apply to cable. Third, even if economic-monopoly characteristics could justify some regulation of cable beyond that already applicable through the antitrust laws, it would not justify the differential tax scheme here, which does not purport to be tailored in response to such a problem.

An additional rationale for regulation is suggested by language in the Tenth Circuit's decision in *Community Communications Co.* to the effect that cable systems have "always been regulated in many respects" and that there is absent a "tradition of nearly absolute freedom from government control." 660 F.2d at 1379. This is true, but as a justification for differential taxation, it suffers from the same difficulty identified with respect to other potential justifications: it has no connection to a particular need to tax in any, let alone the present, discriminatory manner. Indeed, the logic of this view is dangerously wrong. This Court has never held that, once a medium of communication has been sufficiently regulated, any additional regulation is permissible regardless of its justifiability—and, as here, regardless of whether even the more general regulation has been constitutionally tested (as cable regulation has not widely been). The First Amend-

ment requires a strong state interest for each particular burden on First Amendment speech activity. Speech in new media cannot be regulated willy-nilly based on circular reliance on other regulatory burdens. Indeed, the Tenth Circuit in *Community Communications Co.* itself so recognized, noting that "the power to regulate is not one whit broader than the need that evokes it." *Id.* at 1379.

In pointing out the inadequacy of various proffered justifications, we do not assert that different taxation methods could never be justified by the unusual business characteristics of a particular enterprise.[18] The only such justification even hinted at in this case, however, is the Arkansas Supreme Court's suggestion that it "would be impossible" to tax broadcast television on the same terms as cable television. Pet. App. 7a. But that suggestion plainly fails, even aside from the apparent absence of record evidence to support it. The suggestion simply ignores the possibility that sales of advertising by broadcasters could be taxed at the same rate as sales of cable service or sales of tangible goods.[19] *See McGraw-*

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[18] It may be, for example, that the organization or some other commercial aspect of a particular medium would require that it be given specialized tax treatment. Thus, in *Times Mirror Co. v. City of Los Angeles*, 192 Cal. App. 3d 170, 237 Cal. Rptr. 346 (Ct. App. 1987), *appeal dismissed*, 484 U.S. 1022 (1988) the court rejected a newspaper's argument that a gross receipts tax was invalid because the state used a different method to compute taxes on the motion picture industry. The court found that the motion picture industry was by nature fragmented, with the various fragments taxed as different business activities. *Id.* at 185, 237 Cal. Rptr. at 355. Thus, although the California appeals court declined to give close scrutiny to the taxation scheme before it, the scheme might well have satisfied the standard suggested here.

[19] Insofar as the Arkansas Supreme Court alluded to the difficulties of establishing a tax with equal *effects* on broadcasters, its statement is essentially a red herring. One of the tacit conclusions of *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project* is that, when the dangers associated with discriminatory tax burdens are present, it is unnecessary to inquire into the actual effect of

Hill, Inc. v. State Tax Comm'n, *supra* (no compelling interest justified failure to tax broadcast advertising when such a tax applied to print media); *Oklahoma Broadcasters Ass'n*, *supra* (no compelling interest justified tax on sale of broadcast advertising that did not apply to print media). Moreover, the argument is incomplete by its own terms, for it does not even purport to justify the discriminatory favoring of newspapers and magazines, whose sales to customers could be directly taxed. In short, there is no sound basis here for any conclusion that the special organizational characteristics of different media justify the system of tax favoritism established by the State.

To repeat: the State cannot prevail simply by showing that cable is a distinct medium of communication that uses new technology. The protections of the First Amendment have never been limited in terms of the speakers' method of communication. Indeed, as this Court has recognized, even traditional media such as newspapers have changed in ways that the Framers of the First Amendment could scarcely have imagined. *See Miami Herald*, 418 U.S. at 248-49. The basic protections of the First Amendment, however, have not been diminished by such changes. Those protections require that discriminatory taxation of the media be supported by a strong justification. There is no such justification for the discriminatory tax against cable television at issue here.

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the discriminatory tax. Insofar as any two businesses are in different economic circumstances, any tax will affect them unequally. Such differences of course easily survive rational basis scrutiny, and are irrelevant under the stricter scrutiny applicable here.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Arkansas should be reversed in part.

Respectfully submitted,

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Nos. 90-29 and 90-38
(Consolidated)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,
Petitioners,

v.

DANIEL L. MEDLOCK, *et al.*,
Respondents.

DANIEL L. MEDLOCK, *et al.*,
Petitioners,

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF DANIEL L. MEDLOCK, ET AL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-29

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,
Petitioners,

v.

DANIEL L. MEDLOCK, *et al.*,
Respondents.

No. 90-38

DANIEL L. MEDLOCK, *et al.*,
Petitioners,

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF DANIEL L. MEDLOCK, ET AL.

The National Association of Broadcasters and the Association of Independent Television Stations, Inc., with consents of the parties, submit this brief *amici curiae* in support of Daniel L. Medlock, *et al.*, Petitioners in No. 90-38 [hereinafter referred to as "Taxpayers"].

INTERESTS OF AMICI

The National Association of Broadcasters (NAB) is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and all the major networks.

The Association of Independent Television Stations, Inc. (INTV) is a nonprofit association of independent television stations, television stations not primarily affiliated with the three established national television networks. INTV promotes the interests of independent television stations.

This case presents two issues of critical concern to *amici* and their members. Taxpayers have asked the Court to decide the nature and scope of the protection afforded cable television by the First Amendment. Broadcast television stations compete with cable systems in the provision of video programming to the public and in the sale of advertising, as well as being the source of the most popular programming on cable systems. The environment in which broadcast stations and cable systems compete has largely been defined by regulations, statutory and administrative. *Amici*, therefore, are heavily involved in legislative, regulatory, and judicial proceedings concerning the regulation of cable television and the video marketplace. Often, cable operators' First Amendment status has been a significant issue in these proceedings and *amici* therefore have a vital interest in any resolution of that issue.

The broadcast stations which are members of NAB and INTV also have a vital interest in protecting their own First Amendment interests in not being subjected to discriminatory taxes. *Amici* consequently are interested in ensuring that the protections afforded the press in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), are not curtailed.

SUMMARY OF ARGUMENT

The Court should decline the invitation presented by Taxpayers to make a determination of cable television's precise status under the First Amendment. That cable operators are First Amendment speakers has not been in doubt since *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), and this case can and should be resolved according to established First Amendment principles applicable to all members of the press. It is unnecessary and would be inappropriate for the Court to anticipate questions of cable operators' First Amendment rights that may be presented in other cases dealing with cable television's unique status and characteristics, cases in which—unlike the case at bar—a full record will be developed to aid the Court in resolving the question it left open in *Preferred*: whether cable television should be treated for First Amendment purposes like broadcasting, or the print media, or another formulation distinctive to cable television.

The decision of the Arkansas Supreme Court would vitiate the principle determined in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), that the First Amendment prohibits states from imposing taxes which single out the press or which apply different standards to the taxation of the media. The electronic media are no less entitled to this protection than are newspapers and magazines; indeed, the Court in varied contexts has consistently recognized that broadcasters and other electronic publishers are equally part of the press. State court decisions following *Minneapolis Star* have agreed that differential treatment of the electronic press is barred by the First Amendment. Arkansas has advanced no compelling justification for singling out cable television for taxation, and the tax before the Court should be found to violate the First Amendment.

ARGUMENT

I. THE SCOPE OF THE FIRST AMENDMENT RIGHTS OF CABLE TELEVISION OPERATORS NEED NOT BE ADDRESSED IN THIS CASE

Despite Taxpayers' request that it do so,[1] the Court in this case should refrain from deciding the precise nature and degree of protection afforded cable television by the First Amendment—an issue left open in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986); *id.* at 496-97 (Blackmun, J., concurring). Contrary to Taxpayers' contentions, it is neither necessary nor appropriate for the Court to address this issue in resolving the instant case. *Amici* urge the Court to leave the issue of the proper First Amendment standard applicable to cable regulation to a case which both presents the issue squarely and in which an adequate record on the issue has been developed.

First, the level of cable operators' First Amendment rights is not dispositive of this case and, therefore, should not be reached. As discussed in Argument II, *infra*, a determination of the validity of the Arkansas tax at issue does not depend on a precise evaluation of the First Amendment status of cable television. In *Preferred*, the Court recognized that the activities of cable operators "seem to implicate First Amendment interests as do the activities of wireless broadcasters." 476 U.S. at 494; *see FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (recognizing some exercise of editorial discretion by cable operators in selecting programming). No further delineation of cable operators' First Amendment posture is needed to decide this case.

It is established that "[t]he Court will not 'anticipate a question of constitutional law in advance of the neces-

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[1] Taxpayers' Petition for Certiorari at 19-24.

sity of deciding it.'" *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring), *quoting Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39 (1885). Following this principle, the Court should not now proceed beyond its holding in *Preferred* that cable operators are, at least for some purposes, First Amendment speakers.

Second, defining cable television's First Amendment status would be particularly inappropriate in this case because the facts concerning this issue were not developed sufficiently in the record below. Nothing more than generalized descriptions of the activities of cable system operators appear to have been placed into the record before the Arkansas Chancellor, and neither opportunity nor occasion arose below for any detailed exploration of the implications of according cable operators a particular standard for judging intrusions on their free speech interests. In *Preferred*, a case which turned directly on the level of First Amendment protection which cable systems could claim, this Court declined to rule on that issue because of the inadequate record presented.

> "We think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the present uses of the public poles and rights-of-way and how respondent proposes to install and maintain its facilities on them." [2]

The record in this case provides no answers to the questions which the Court determined in *Preferred* should be addressed prior to its discussion of the constitutional standard which should be applied to cable regulation. The Court should decline to consider the issue until a case is presented in which the record necessary to properly evaluate cable operators' free speech interests has been assembled.

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[2] 476 U.S. at 495.

A decision settling the scope of cable operators' First Amendment rights would have broad implications. The issue affects both local regulation of cable systems [3] and federal statutes and regulations concerning the role of cable systems in the video and information market.[4] Taxpayers indeed allude to this in asserting that the Court should make a comprehensive determination of the rights of cable operators as "guidance" to Congress in addressing cable regulation. Taxpayers' Petition for Certiorari at 22 n.11. Of course, it is not the function of this Court to give advisory opinions to Congress on the scope of its authority in a particular area. *E.g.*, *Ashwander*, 297 U.S. at 345-46 (Brandeis, J., concurring); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

Justice Blackmun wrote in *Preferred*:

> "Different communications media are treated differently for First Amendment purposes . . . In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis." [5]

As cable television becomes more pervasive,[6] the need to

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[3] *See, e.g., Preferred Communications, Inc. v. City of Los Angeles*, No. CV 83-5846 (CBM) (C.D. Cal. Aug. 24, 1990) (constitutionality of local cable franchise requirements).

[4] *See, e.g., Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir.), *clarified*, 837 F.2d 517 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988) (local signal carriage regulations); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (local signal carriage regulations); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (program siphoning regulations).

[5] 476 U.S. at 496 (Blackmun, J., concurring).

[6] The growth of cable television has been dramatic. In 1975, only 14 percent of television households received cable service. *The*

determine the level of First Amendment protection which cable operators may claim will grow. Further challenges to municipal regulation of existing cable systems will arise and decisions will be made concerning entry of potential competitors to such systems. Regulations intended to integrate cable television with other communications media may be adopted, for example, by ensuring even-handed access for local television stations to households which receive their video signals from cable. Rather than addressing the constitutional rights of the cable medium here where that issue is at best tangential, the Court should defer consideration of the extent of cable television's First Amendment interests for a case in which that issue is dispositive.

II. THE FIRST AMENDMENT'S BAR ON TAXES WHICH SINGLE OUT THE PRESS EXTENDS TO THE ELECTRONIC MEDIA TO THE SAME EXTENT AS THE PRINT MEDIA

Arkansas contends that the greater level of regulation permitted for cable television services, such as the requirement of a local franchise, and the use of public rights of way to deliver cable services permits the State to impose a unique tax burden on cable operators. Presumably, Arkansas also would argue that the regulated status of other electronic media empowers the State to exact taxes addressed to those media only, or which place a differential burden on those media.

The Supreme Court of Arkansas, while disagreeing with the State's virtual exclusion of the electronic media from the protection the First Amendment affords against burdensome taxation of the press, narrowly construed

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Kagan Media Index, Oct. 22, 1990, at 2. Today, cable passes 92 percent of all television households and basic cable has a penetration rate of almost 60 percent of passed homes. *Id.* at 6. The majority of television households, therefore, now receive their video service from a cable operator.

the State's obligation to permit it to tax particular segments of the media if an identical tax were imposed upon another medium providing what the court viewed as essentially identical services to the public. Taxpayers' Petition for Certiorari at 7a. This Court's decisions provide no support for either proposition, and endorsement of the Arkansas cable tax either as initially enacted or as amended would vitiate the protection the Court has found the First Amendment provides against discriminatory taxation of the press.

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), the Court struck down a state tax which applied only to certain newspapers. It held:

> "When the State singles out the press, . . . the political restraints that prevent a legislature from passing crippling taxes of general applicability are weakened and the threat of burdensome taxes becomes acute. . . . Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." [7]

Nothing in the *Minneapolis Star* opinion suggests that the Court's ruling was limited to newspapers or the print media. There is no basis to conclude that states are free to single out one medium for different tax burdens than others without demonstrating a compelling need for such differentiation.

Indeed the Court's focus in *Minneapolis Star* on the difficulty courts have in assessing claims of the relative burdens of different tax schemes [8] supports the view that differential tax burdens among media are no more ac-

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[7] 460 U.S. at 585.

[8] *Id.* at 589-90.

ceptable than disparate treatment of particular users of one medium. Certainly, the effect of special treatment of one class of speaker within a medium or of special treatment of the press generally would be far easier to assess with precision than the effect of different tax schemes for distinct types of media. The Court's subsequent decision in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), demonstrates that the rule in *Minneapolis Star* was not limited to newspapers, since the latter case held invalid a tax which distinguished between types of magazines.

The courts, including this Court, have long recognized that the "press" includes both the print and electronic media. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lowell v. City of Griffin*, 303 U.S. 444, 452 (1938). In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110 (1973), the Court concluded that "Congress intended to permit private broadcasting to develop with the widest jouralistic freedom consistent with its public obligations."

The Court also has recognized in other contexts that the term "press" for First Amendment purposes fully includes the electronic media. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court held that the First Amendment interest in a vigorous press precluded a state from imposing civil liability for the broadcast of information contained in public records. Similarly, First Amendment protections for the press from certain defamation actions apply to the electronic media in the same manner as they do to the print press. *See, e.g., Herbert v. Lando*, 441 U.S. 153 (1979); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 32 n.3 (1971).[9]

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[9] *See also Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 110 (1979) (Rehnquist, J., concurring) (statute imposing criminal sanc-

Where the Court has adopted a more restrictive view of the First Amendment for electronic media, it has always been in the context of regulation which directly relates to the unique role of the particular medium at issue. *See, e.g., Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).[10] Arkansas' contention that the validity of one type of regulation of a medium virtually eliminates First Amendment protection for that medium finds no support whatever in this Court's decisions.

The state court decisions following *Minneapolis Star* are to the same effect. In striking down a tax similar to the one at bar applied to a subscription television service, the California Court of Appeal held that "[t]here is no doubt that Premier, as a disseminator of motion pictures, news, and other information and entertainment programming, engages in conduct protected by the First Amendment." *City of Alameda v. Premier Communications Network, Inc.*, 156 Cal. App. 3d 148, 152, 202 Cal. Rptr. 684, 686 (Cal. Ct. App.), *cert. denied*, 469 U.S. 1073 (1984). In *McGraw-Hill, Inc. v. State Tax Commission*, 75 N.Y.2d 852, 552 N.E.2d 163, 552 N.Y.S.2d 915 (N.Y. 1990), the court adopted a lower court decision holding unconstitutional a method of calculating income subject to tax which was applied differently to broadcasters than to magazines. The court concluded that it is presumptively unconstitutional to single out any part of the press for taxation, and rejected the state's argument that the greater level of regulation permitted for the broadcast media authorized different tax treatment. That electronic media may be more susceptible to government regulation,

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tions on newspapers unconstitutional because it did not apply to broadcast stations).

[10] Note, however, that in *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984), the Court suggested that the scarcity rationale permitting certain regulation of broadcasters may have little continuing vitality.

the lower court held, "fails to show any compelling state interest in taxing the two types of media differently." *McGraw-Hill, Inc. v. State Tax Commission*, 146 A.D.2d 371, 541 N.Y.S.2d 252, 255 (N.Y. App. Div. 1989).

In an Oklahoma case involving a sales tax scheme resulting in a different level of burden being placed on broadcasters than on the print media, the Supreme Court of Oklahoma also concluded that the regulation of broadcasting due to its use of spectrum did not authorize the state to subject broadcasters to different tax burdens. The Court stated:

> "Both *Minneapolis Star* and *Ragland* found *First Amendment* violations resulting from a differential tax scheme between different members of the press. Though both *cases* admittedly dealt with differential treatment between members of the *print* media, there is nothing to suggest that this court should, without sufficient justification, approve preferential treatment of the print media over the broadcast media, where both are members of the press. The First Amendment guarantees freedom of the press—not just the *printed* press."

Oklahoma Broadcasters Association v. Oklahoma Tax Commission, 789 P.2d 1312, 1316 (Okla. 1990).

In the present case, cable television systems in Arkansas provide, as the Court determined in *Preferred*, a medium for the transmission of information and opinion. While cable systems may not be entitled to the same degree of First Amendment protection as newspapers or magazines or broadcast stations, the above authorities make clear that cable, as a part of the press, is entitled to the protection of the First Amendment from discriminatory taxation. Were the narrow view of the Arkansas court to be accepted in this case, the evil which the Court identified in *Minneapolis Star*—using taxes to punish or restrict expression—would be permitted to any state careful enough to place the discriminatory tax on all

users of a particular medium. *Amici* urge the Court to reject such a dangerous interpretation of the First Amendment.

A state which assesses a tax on the media or which creates a distinct burden only on particular media must be required to demonstrate a compelling state interest requiring the differential treatment.[11] No such reason has been advanced by Arkansas in this case; indeed, its primary argument appears to be that cable systems might have been subjected to the gross receipts tax even absent the passage of the enabling provision in question. At most, this can be interpreted as relating to the State's interest in raising revenue, an interest which *Minneapolis Star* concluded is inadequate to justify differential taxation of the press. 460 U.S. at 586.

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[11] Arkansas argues that differential taxes should be evaluated under the standard of *United States v. O'Brien*, 391 U.S. 367 (1968). The use of *O'Brien* in this context is mistaken. The *O'Brien* test by its own terms is used to determine whether "a sufficiently important governmental interest in regulating the nonspeech element [of the conduct addressed in a regulation] can justify incidental limitations on First Amendment freedoms." *Id.* at 376. There is no nonspeech element of cable service which the Arkansas tax is intended to control. The balancing of interests required by *O'Brien* is therefore not called for; taxes which discriminate against the media are presumed unconstitutional unless the state can demonstrate a compelling interest requiring the unequal treatment.

CONCLUSION

For the foregoing reasons, the National Association of Broadcasters and the Association of Independent Television Stations, Inc. urge the Court to refrain from deciding the precise scope of protection afforded cable television by the First Amendment and to hold the Arkansas gross receipts tax on cable television an unconstitutional burden on the right of a free press guaranteed by the First Amendment.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICUS CURIAE

The California Cable Television Association ("CCTA") submits this brief as *amicus curiae* in support of Daniel L. Medlock, Community Communications Company and the Arkansas Cable Television Association.[1]

CCTA is a trade association representing cable television system operators that provide cable television serv-

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[1] Consistent with Sup. Ct. R. 37.3, both parties have given CCTA their consent to the filing of this brief.

ice to over five million California residents. CCTA brings information to the Court concerning the extent and impact of discriminatory taxation of cable television in California. This *amicus* brief will illustrate that resolution of the issues before this Court in these cases will have an impact outside of the state of Arkansas, and well beyond the issue of discriminatory sales taxes.

Cable operators in California are subject to different, but equally invidious, forms of differential taxation. Property taxation of cable television systems and utility user taxation of cable television subscribers are currently the subject of litigation in the California state courts. CCTA has filed *amicus* briefs in California proceedings involving discriminatory taxation of its members.

CCTA is also a central clearinghouse for information on programming provided by its member cable operators, much of it relating to the core concern of the First Amendment. This programming is threatened by the imposition of discriminatory taxes. CCTA's experience puts it in a unique position to bring to this Court evidence of the effect of discriminatory taxation on cable speech.

SUMMARY OF ARGUMENT

In order to decide this case, the Court need not decide all of the questions as to cable television's First Amendment status left open in its 1986 *Preferred* decision.[2]

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[2] *City of Los Angeles v. Preferred Communications*, 476 U.S. 488 (1986). In a concurring opinion, Justice Blackmun, joined by Justices Marshall and O'Connor, noted: "Different communications media are treated differently for First Amendment purposes," and that, with respect to cable television, the Court had yet to have a factual record to determine whether the characteristics of cable television "make it sufficiently analogous to another medium to warrant application of an already existing standard or whether the characteristics require a new analysis." *Id.* at 496. Newspapers, magazines, and cable television are analogous in that they are either purchased directly or by subscription by their readers or viewers, and unlike television and radio, are not subject to spectrum scarcity.

For the purposes of this case, the Court need only find that cable television is a medium engaged in expressive activities of the type the First Amendment was designed to protect, that it is subject to discriminatory taxation, and that the discriminatory treatment of cable television in the particular instance before the Court has no basis in a valid governmental purpose other than the mere raising of revenue.

CCTA contends that, based on the experience of cable operators in California, precisely the same vices of potential speech restraint that were present in the *Minneapolis Star*[3] and *Arkansas Writers' Project*[4] cases are inherent in the discriminatory taxation of cable television. The Court should therefore hold the principles articulated in these cases to be fully applicable to discriminatory taxes against cable television.

ARGUMENT

I. CALIFORNIA CABLE TELEVISION SYSTEM OPERATORS ENGAGE IN SPEECH ACTIVITIES PROTECTED BY THE FIRST AMENDMENT

While this Court has not yet delineated the precise limits of the First Amendment protections extended to cable television, it is clear that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include."[5] Operators of cable television systems in California engage in three types of speech activities over their cable television facilities: (1) as originators of expression, (2) as distributors of the expression of others, and (3) as facilitators for access users. In all of these roles the cable sys-

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[3] *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

[4] *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

[5] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

tem operator engages in expressive activities traditionally protected by the First Amendment.

A. Editorial Discretion Exercised By California Cable Systems

California cable television system operators make editorial choices among a wide variety of broadcast signals and satellite delivered networks designed specifically for cable system use. California cable systems select local broadcast signals, choosing among the three major network affiliates, Fox affiliates and other commercial independents, and public television stations in the local area.[6] California cable operators also decide whether to import broadcast signals that cannot be received over the air with ordinary home antenna equipment.[7]

California cable operators also select from among the more than 100 satellite-delivered program networks created specifically for the cable industry.[8] Nearly all of the over 5 million California cable subscribers have access to twenty-four hour news from CNN and coverage of the United States Senate and House of Representatives from C-SPAN as part of their basic cable package.[9]

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[6] Since the 1985 D.C. Circuit decision striking down the FCC's former local broadcast signal "must-carry" rules, these editorial decisions are solely those of the cable operator. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

[7] These signals, such as "superstations" WTBS, Atlanta, or WGN, Chicago, are brought into the cable operator's service area either by microwave or by satellite.

[8] *See Television & Cable Factbook* at C-1 (1990 ed.) (10 pay, 70 basic, and 27 sports network programming services available to cable systems.) *See also Cablevision*, June 18, 1990, at 84. (Twenty-four satellite-fed services have been announced for introduction over next 24 months.)

[9] Two other national networks planning to cover legal affairs and the courts will also soon be available to California operators.

A cable television system operator's selection of programming involves a classic editorial function protected by the First Amendment. The fact that the expression may in some cases be originated by another party does not remove the First Amendment protection that these editorial decisions usually enjoy. The *Los Angeles Times* or *San Francisco Chronicle* is not considered entitled to less First Amendment protection when it publishes an article as reported by the Associated Press, or the opinion of a syndicated columnist. A broadcaster is no less protected when it selects network or syndicated programming.

Selection of Cable News Network, Black Entertainment Television, or The Disney Channel and rejection of another service competing for limited channel space reflect conscious editorial choices by cable operators. Cable operators carefully review the program networks they carry and, over time, some are dropped and others added based, in part, on their content. Seldom do two cable systems in California select precisely the same programs to offer to the public.

B. State and Local Programming Produced Or Transmitted By California Cable Operators

California cable television system operators also produce their own programming and facilitate cablecasting through public, educational and governmental access channels. In addition, there are a number of state and regional networks unique to California. Much of this programming concerns public affairs. Sometimes cable television is the only source of such local information and opinion. To tax an entity creating and distributing this programming in a manner different from competing media, such as newspapers and magazines, without a nexus to a purpose other than the raising of revenue, not only creates a chilling effect on highly valued programming, but also impermissively places the government in the position of handicapping competition in the marketplace of ideas.

1. *CAL-SPAN: California's Public Affairs Network*

In August, 1990, a state version of C-SPAN, "CAL-SPAN," distributed live and taped sessions of the California legislature, its committees and subcommittees to over 2 million California cable subscribers. This test gave California citizens their first video access to the state legislature.

In future months, CAL-SPAN plans to transmit live and taped coverage of both the California Assembly and Senate to homes, schools, and businesses throughout the state. In addition, CAL-SPAN plans to cover proceedings of regulatory boards, executive branch commissions and departments, state supreme court oral arguments, and press conferences. It also plans to disseminate news and analysis.

Even before a regular feed of CAL-SPAN has begun, California cable system operators with over 2 million subscribers have made written commitments to carry CAL-SPAN programming. In many cases, their ability to meet this commitment depends upon their financial ability to upgrade their cable systems in order to create adequate channel capacity to add the CAL-SPAN service to their current full menu of programming.

2. *Regional California News Networks*

California cable operators also carry unique regional news networks. For example, in September 1990, Orange County NewsChannel began 24 hour televised local news, sports, public affairs and cultural events coverage of Orange County, California, where most over the air news comes from television stations that focus on neighboring Los Angeles County.[10] NewsChannel is being operated by Freedom Newspaper Corporation, which owns the *Orange County Register*, a local newspaper. Newspaper

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[10] NewsChannel is currently distributed to almost 200,000 of the 450,000 cable subscribers in Orange County.

staff are helping to write and produce the programming for this channel.[11]

Several California cable operators in conjunction with local broadcasters or newspapers are providing four and one-half minute local news and public affairs inserts each half-hour to Turner Broadcasting's "Local Edition" in its national CNN Headline News cable service.[12]

3. *Local Origination Programming*

Local origination refers to cablecasts produced by the cable system operator. Usually, the cable system operator hires a staff producer and constructs its own studio. In some California communities, cable local origination is highly developed, with daily newscasts that rival local broadcasters' newscasts[13] and with depth of coverage that goes well beyond a "Metro" section of the local newspaper. Yet, as shown *infra*, property taxation of these media is very different in California.

As Orange County continues to develop a separate identity from Los Angeles, cable local origination has become the most logical way to serve the television news needs of the community.[14] California cable operators pro-

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[11] Telecommunications, Inc., a California cable operator, is planning a similarly unique local news service for Contra Costa County in the San Francisco Bay Area.

[12] Over 500,000 subscribers receive local news in this fashion in San Diego, over 250,000 in Orange County, and over 150,000 in San Jose.

[13] Cable operators also program local advertising spots for local and national products and services, including paid political advertisements. These may be run on local programming or inserted into national cable program services. This distribution of commercial speech is also a form of expressive activity.

[14] "Dimension Forum", produced by Times Mirror Cable Television in Orange County, in its third year of production, is a 30 minute weekly public affairs cablecast that features interviews with local officials, community leaders and candidates for local elections. Other local programs include live and tape-delay cablecasts of city

vide essential additional services by covering local political affairs even where broadcasters have regular local news and public affairs programming, such as Los Angeles [15] or San Francisco.[16]

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council meetings and local community events, such as sporting events and parades.

American Cablesystems of California produces several local programs in Orange County concerning political speech, including "The Washington Report," two interview programs that feature local politicians and community leaders, programs on the police department and on educational issues, live broadcasts of all city council meetings, live election coverage including debates, and other debates on community concerns.

M.L. Media Partners/Multivision, an Anaheim cable operator, provides "Newsline 3," a daily local news program covering hard news as well as political issues. It also produces debates and features on politically sensitive issues such as Orange County's proposal to locate a large jail in Anaheim.

Comcast in Santa Ana, a small Orange County cable system with less than 25,000 subscribers, programs two local channels that focus on city issues and events. K Buenavision, a Spanish language service, provides locally-produced public affairs programs targeted towards Santa Ana's large Hispanic population. There is no other local news media information source for Spanish speaking residents.

[15] Over the past two years, Century Cable Television has produced over 200 locally-originated public affairs programs distributed on a regular basis to thirty Los Angeles area cable television companies, with wider distribution when events warranted. Century's regular "Week in Review" program features politicians, press, and pundits discussing issues of community concern. Issue specials spotlight particular questions of public concern. Personality profiles highlight individuals in politics, business and entertainment. Election specials have included candidate profiles, debates, press conferences, interviews, and critiques of political commercials. Century distributed statewide the only video debate between the candidates for state treasurer to all California cable systems. Century recently carried an exclusive interview with Vice President Quayle. *Multichannel News*, Nov. 5, 1990 at 16.

[16] Viacom 6, the local origination channel of Viacom of San Francisco, employs twelve persons who produce local public affairs

California operators air views critical of local government officials on their local origination channels. In fact, one Orange County system has editorialized on its local origination channel against discriminatory property taxes levied against it and other cable television operators.[17]

4. *Public, Educational and Governmental Access*

The most common form of access programming offered by California cable operators is on one or more channels offered on a first come, first served basis for any member of the public to use.[18] Almost two-thirds of California cable operators also make access channels available to local governments for coverage of public, government, and business activities and to local schools for educational programming.[19] These channels provide an outlet for local public expression.[20]

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programming and facilitate public access programming. Viacom 6 has three regular half-hour shows: "Viewpoint," an interview show, features public officials; "City Desk," a live round table discussion, features journalists discussing San Francisco news and events: "Helping Hands," a public health show, with a particular emphasis on AIDS. Monthly shows and specials on the arts, politics, neighborhood viewpoints and earthquake safety have also been produced.

[17] *See infra* pp. 13-17.

[18] Cable operators do not play an entirely passive role in the presentation of access programming. Often the public can use the cable systems' studios to produce programs subsequently carried on the access channels. In addition, many operators provide equipment and training to community and educational groups to facilitate their use of the video medium.

[19] *The Kagan Census of Cable and Pay TV* at 25-49 (Dec. 1989); *Television and Cable Factbook* at A103-A179 (1990 ed.).

[20] The provision of access channels furthers a congressionally-articulated goal of diversity of expression inherent in the First Amendment. *See* legislative history of the Cable Communications Policy Act of 1984, Pub. L. No. 98-544 ("Cable Act"), 1984 U.S. Code Cong. & Admin. News, 4655, 4668. The Cable Act also requires designation of a certain number of a cable operator's chan-

II. CALIFORNIA CABLE OPERATORS ARE BEING SUBJECTED TO DISCRIMINATORY TAXATION

Under California law, the intangible assets of a cable television operator are not taxable. Nonetheless, county assessors have been attempting to levy property taxes on cable television operators based upon assessments that directly subject the cable operators' intangible assets to taxation. This has resulted in facially discriminatory taxation where other First Amendment speakers or non-speech businesses are not taxed by the same methodology. Moreover, Orange County cable operators have been singled out for discriminatory tax treatment because of their status as disfavored members of the media and in retaliation for the Assessor's opinion that the cost of cable programming is excessive. California cable television operators are also subject to discriminatory utility user taxes.

A. Cable Television Systems Are Being Valued For Property Taxation Purposes Differently Than Other Competing Media

Under California law, property taxes are levied annually on each taxpayer's real and tangible personal property. Intangible assets are exempt from property taxation.[21] In 1986, the California Court of Appeals held

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nels for commercial use by "persons unaffiliated with the operator." 47 U.S.C. § 532(b) (Supp. 1990). California operators with 36 or more activated channels must designate from 10 to 15 percent of their channels not otherwise required for use for leased access. Asian, Hispanic, Black and other ethnically-oriented programmers, as well as real estate and other businesses seeking direct access to the public, have leased space from California cable operators.

[21] Cable television systems are stated not to be subject to *ad valorem* property taxes on the value of their intangible assets or rights, including without limitation: "franchises or licenses to construct, operate, and maintain a cable television system for a specified franchise term (excepting therefrom that portion of the franchise or license which grants the possessory interest), subscribers, marketing, and programming contracts, non-real prop-

that a cable operator's right to use the public rights of way constituted a taxable possessory interest.[22] The opinion failed to provide guidance on how to value this unique property right. As a result, many of California's 58 county assessors began to take widely divergent positions on how to value the possessory interest.[23]

In 1988 the California Legislature passed A.B. 3234 in an effort to bring about uniformity and certainty in assessments of possessory interests of cable television operators in the wake of the *Cox* decision.[24] The legislature's action was necessary because certain California cable operators had been singled out for differential treatment for property tax purposes.

Unfortunately, despite the legislation and a California court decision that specifically held that a cable company's right to do business is protected by the First Amendment and not subject to property taxation,[25] some

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erty lease agreements, management and operating systems, a work force in place, going concern value, deferred, start up, or prematurity costs, covenants not to compete, and good will." Cal. Rev. & Tax. Code § 107.7(d) (West Supp. 1990).

[22] *Cox Cable of San Diego, Inc. v. County of San Diego,* 185 Cal. App. 3d 368, 229 Cal. Rptr. 839 (1986).

[23] At least twelve California counties have taken a discriminatory approach to taxing cable television systems over the last several years. Appeals of these decisions are pending in several California courts.

[24] Cal. Rev. & Tax. Code § 107.7(a) (West Supp. 1990). Pursuant to that statute, an assessor may value the possessory interest using any acceptable statutory method. However, "the preferred method of valuation of cable television possessory interest is capitalizing the annual rent, using an appropriate capitalization rate." *Id.* at § 107.7(b)(1). This method avoids the taxation of nontaxable intangible assets. *Id.* at § 107.7(d).

[25] *County of Stanislaus v. Assessment Appeals Board,* 213 Cal. App. 3d 1445, 1454, 262 Cal. Rptr. 439 (1989) ("The levying of

cable operators are still being assessed based upon the full value of their systems as going concerns. As a result, they are being taxed on the value of their intangible assets, rather than solely on the basis of the value of their taxable real and tangible personal property.

Some cable systems are today being taxed at values in excess of $2,000 per subscriber when their tangible asset value, even for a new cable system, approaches $800 to $900 per subscriber. Older cable systems have a tangible asset value of far less: approximately $300 per subscriber. The impact is substantial. Some cable operators already have had to increase a subscriber's bill by approximately $2.00 per month—approximately a 12 percent increase in the average price charged for basic cable service by California cable operators to their customers in 1989.[26] This puts cable television at a competitive disadvantage relative to other media and has had a chilling effect upon the operators' expressive activities. Moreover, it impairs their ability to provide existing or future programming, including local origination and access programming.

Other media businesses or similarly-situated businesses with substantial intangibles or using public rights of way are not taxed in this manner. Although newspapers, radio stations, television stations and motion picture theaters are bought and sold on the basis of cash flow when they change hands, very much like cable, they are not treated like cable television by the assessors. Unlike cable television system operators, their substantial intangible assets are not assessed.

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ad valorem taxes on Post-Newsweek's right to do business as a cable operator would be unique to nonutility taxpayers in California.")

[26] *The Kagan Census of Cable and Pay TV* at 49 (Dec. 1989) (average basic rate in California of $16.70 per month).

A January, 1990 study by Kagan Media Appraisals, Inc. provided startling findings of discrimination.[27] In eleven of twelve counties, on average over a three-year period, non-cable media properties were being assessed at only about 25 percent of sales price while cable television systems were being assessed at an average of 131 percent of sales price. Broadcast properties were assessed at an average of 19 percent of sales price and newspapers at an average of 35 percent of sales price.

The inescapable conclusion is that cable television operators in many California counties are being taxed on the value of a cable business' substantial intangible assets, while other media, including television, radio and newspapers, are not. No California taxing authority has articulated a valid governmental objective for treating cable television differently from other speech media with which it competes, and none exists.

B. Cable Television Operators In Orange County Are Being Taxed In A Discriminatory Manner Based On The Assessor's Opinion That The Cost Of Cable Television Is Excessive

One of the most important concerns of this Court in its prior decisions on differential taxation of media speakers has been the potential for such taxes to be used for censorial purposes. Such a purpose is overtly present in the property taxation of cable operators in Orange County.

Prior to 1989, the Orange County Assessor's Office assessed a cable television company's taxable, tangible property by determining its original cost and the year of acquisition and then depreciating this taxable property to determine its present value in light of its remaining use-

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[27] Relevant portions of this study are appended to this brief. Kagan Media Appraisals, Inc. ("KMA") is a Carmel, California based company specializing in the valuation of broadcast, cable television, and other media and entertainment businesses. Over the past 17 years KMA personnel have appraised nearly $17 billion of media properties. This KMA study was commissioned by CCTA.

ful life. The identical assessment method was applied to other businesses in Orange County that had both taxable and substantial intangible property.

Beginning in 1989, however, the Assessor's Office adopted a radical new method for valuing cable television tangible property which has been called the "unitary method." In essence, the unitary method includes a cable operator's non-taxable, intangible property.[28] Application of the unitary method had increased each cable system operator's property tax obligation by $1.50 to $2.50 per subscriber per month.

The unitary method is not used to assess other similarly-situated industries or businesses in Orange County. A study that compared the sales price or the fair market value to assessed value of similarly-situated businesses found the assessed value of non-media businesses in Orange County is 16% of estimated fair market value, and the assessed value of other media businesses besides cable is 28% of their estimated fair market value. In stark contrast, the assessed value of cable television systems was 168% of their estimated fair market value.[29]

The situation in Orange County has led to a virtual state of siege between the local cable operators and the county Assessor. Some cable companies were forced to

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[28] Under this method, a cable television system's tangible property is assessed by determining the value of the business as a whole including the business' taxable, tangible assets and the value of its non-taxable, intangible assets. The unitary method adopted by the Orange County Assessor ignores the quality, age, condition and the remaining useful life of a system's tangible property. For one company, American Cablesystems of California, this resulted in an annual increase in property taxes from 1988 to 1989 of 371%.

[29] Declaration of Judd C. Ostrom of Kagan Media Appraisals, Inc. in Opposition to Defendant's Demurrer, *Rancho Santa Margarita Cablevision v. Jacobs, et al.*, Case No. X-625669, Orange County Superior Court (filed July 20, 1990), at 5-6.

raise their rates to consumers in order to meet their new tax liabilities. At the same time, they filed appeals to the local Assessment Appeals Board.[30] The cable companies that raised rates explained to their subscribers that the cause for the rate increase was the Assessor's discriminatory reassessment, which had drastically increased the cable operators' tax burden. Subscribers then complained to the Orange County Board of Supervisors and other public officials about the new assessment method.

As a result of these complaints, the Assessor lashed out. He accused "Big Cable" of "violating campaign reform laws by lying to residents and using a monopoly to gouge customers with inflated rates,"[31] and filed meritless complaints at the California Fair Political Practices Commission and the Orange County District Attorney's Office.

The Assessor's own statements make clear that the Orange County cable operators are being taxed differently because they are disfavored members of the media. Moreover, the Assessor has publicly expressed his opinion that the cost of cable television service is excessive.[32]

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[30] Notably, in the first of these appeals, the Assessment Appeals Board specifically rejected the Assessor's unitary method because it subjected the cable operator's intangible assets to property taxation. *The Applications of American Television and Communications Corporation for Change in 1987, 1988 and 1989 Assessments* (Assessment Appeals Board No. 1 of the County of Orange, Nov. 2, 1990).

[31] "Assessor Says Cable TV Firms Lie, Gouge", *Los Angeles Times*, May 22, 1990 at B4. (*See* Appendix).

[32] Each of the affected Orange County cable operators filed Section 1983 civil rights actions in state court alleging violations of the First Amendment, Fourteenth Amendment, Commerce Clause and the Cable Act to enjoin their discriminatory assessments and to obtain damages from the Assessor and Orange County. *Rancho Santa Margarita Cablevision v. Jacobs, et al., supra* n.29 (refiled Oct. 31, 1990).

Such punitive taxation poses a danger to fundamental liberties that the First Amendment was intended to protect. The Assessor's judgment as to the value of cable television programming is implicitly a judgment as to its content. His attack on the cost of cable television is, however indirect, content-based.

The cable operators in Orange County have a legitimate basis to fear further retaliation by the Assessor should they either continue to object to discriminatory taxation, or choose to carry programming critical of the Assessor or his policies, or select programming he does not like, or price their product in a way he feels is inappropriate. This environment can have a chilling effect on cable television system operators' speech and may encourage self-censorship.

Application of the unitary method burdens the Orange County operators' ability to provide existing or future programming. Cable operators continue to seek to improve the quality as well as the quantity of their programming. To the extent that their disposable income must be committed to the payment of dramatically increased taxes, this restricts their future ability to purchase any additional programming without passing that expense on to subscribers. California cable operators caught in this web of discriminatory taxation will also be forced to allocate less funds to local origination and access programming, including the political speech most highly valued by our Constitution.

Discriminatory taxation of cable television system operators in California has had and will have other significant negative impacts on cable speech. The dramatically increased tax burden has reduced operators' cash flow and operating margins, thereby eliminating, deferring or reducing their ability to upgrade or improve equipment, facilities, programming or services or to adopt new technology.

Increases in taxes on cable television systems has required and will require those systems to increase the rates that they charge subscribers to defray additional expenses. Because of increased prices for cable services, the pace of new subscriptions has dropped, and the number of subscribers disconnecting their cable service, or choosing to drop one or more pay services, is up. Increased prices caused by new discriminatory tax assessments have thus adversely affected subscriber retention as well as acquisition, providing cable operators with less net revenues.

To the extent that the financial burden of discriminatory taxation defers or delays system upgrades, increases in system channel capacity that allow for more viewer choice will be retarded. This diminishes the possibility that such new channels as CAL-SPAN or the Orange County News-Channel will be carried. No other California First Amendment speakers are burdened by taxation in such a manner that reduces both the quantity of speech and diversity of expression.

C. Utility User Taxes Are Also Being Applied In A Discriminatory Manner To California Cable Operators

Utility user taxes are imposed on customers of California utilities, as well as on users of cable television.[33] These taxes are collected by the cable operator or utility and appear on the user's monthly bill.

Utility user taxes as applied to cable television customers in California range from a low of three percent to a high of ten percent. In general, these taxes are equal to those taxes applied to users of gas, electric, water, and telephone utilities.

This apparent consistency is deceiving since cable television companies are burdened by franchise fees on top of

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[33] The Cable Act makes it clear that cable is not a utility. 47 U.S.C. § 541(c) (Supp. 1990).

utility user taxes. No California city can by law charge a franchise fee for telephone utilities.[34] Water, gas and electric utilities are limited to a two percent maximum franchise fee (except for charter cities).[35] Thus the total local tax burden on cable television operators, adding franchise fees and utility user taxes, is far greater than on gas, electric, water, and telephone utilities.[36] And, no other First Amendment speakers are burdened by such taxation.

Moreover, in certain localities, gas, electric, water, and telephone utilities are charged a significantly lower utility user's tax than cable television operators. In Oroville, California, for example, cable television viewers are subject to a five percent utility users' tax. While telephone and water customers pay the same tax, customers of gas and electric utilities have a $150 exemption per month. Thus, while most residential purchasers of gas and electrical services pay no taxes on their monthly bills, cable

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[34] *Cf. Pacific Telephone and Telegraph Co. v. City and County of San Francisco*, 197 Cal. App.2d 133, 17 Cal. Rptr. 687 (1961).

[35] Cal. Pub. Util. Code §§ 6006, 6205, 6231 (West 1965 and Supp. 1990).

[36] Discriminatory taxation of cable operators by taxes not of general application also violates the Cable Act to the extent that such taxation, when added to franchise fees, rises to a level of more than five percent of a system operator's gross revenues. 47 U.S.C. § 542(b) (Supp. 1990). The Cable Act preempts state law to the extent state action violates its purposes. *City of New York v. FCC*, 486 U.S. 57 (1988). The Cable Act's basic purpose in placing limitations on state actions is to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(6) (Supp. 1990). Congress apparently believed that franchise fees of above five percent would impose an undue economic burden on cable operators. Discriminatory taxation in any form—sales tax, utility user tax, or property tax—of such a magnitude is unconstitutional under the Supremacy Clause. U.S. Const. art. 6, cl.2.

television users are subject to a five percent tax on their total bill.[37]

Discrimination with respect to the utility user's tax is even greater in Pasadena, California. There, cable television subscribers pay a utility user tax of 8.92 percent as compared to a utility user tax on water and electricity customers of 7 percent, gas of 7.58 percent, and telephone of 7.86 percent.[38] Thus Pasadena cable subscribers pay over one percent higher utility user taxes than purchasers of any other service.

Since these taxes appear on cable company bills, they add to the total perceived cost of cable service, and deter customers from subscribing to cable service. Thus utility user taxes inhibit the dissemination by cable operators of speech as surely as a direct tax on cable operator revenues.

A Sacramento, California cable operator has sued the city with respect to its utility user tax on the basis that it is unconstitutional under the First Amendment. In granting the city's motion for summary judgment the city tax was upheld as constitutional,[39] but the case is now on appeal.[40] Thus the question of the constitutionality of discriminatory utility user taxes placed on cable television users is pending in the California courts and could be affected by this Court's decision.

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[37] Oroville, Cal., Code art. VII, §§ 24-127 to 143. (Exemptions appear at § 24-131.1).

[38] Pasadena, Cal. Ordinances 4.56.030 (telephone tax), 4.56.040 (electricity), 4.56.050 (gas), 4.56.060 (water), 4.56.070 (cable television).

[39] *Sacramento Cable Television v. City of Sacramento*, Case No. 510433, Sacramento Superior Court (December 28, 1989).

[40] *Id.*, Case No. 3 CIVIL C008372 (Ct. of App. 3d Dist., filed Feb. 20, 1990).

CONCLUSION

The cumulative effect of these discriminatory assessment and taxation policies in California is oppressive. In some markets, the combination of a cable operator's franchise fee of five percent of gross revenues, property taxation under discriminatory valuation of intangibles, and a utility user's tax at a higher rate of up to 10 percent creates a tax burden of up to 25 percent of gross revenues per month. This means that almost 25 percent of each cable subscriber's monthly bill, or a quarter of a system operator's gross revenues, must be dedicated to taxation, much of which is imposed on a discriminatory basis against cable operators.

At the same time, many of cable's competitors in the electronic media, such as over the air broadcasters, satellite master antenna systems, microwave distribution systems, or direct broadcast satellites, and its competitors in the print media, such as newspapers and magazines, pay no franchise fee, no utility user tax, and are not subject to the same discrimination in property taxation. This has a direct and immediate adverse impact on the First Amendment rights of cable operators and subscribers.

CCTA has demonstrated that the dangers inherent in discriminatory taxation of communications media extend beyond print. California represents an area where discriminatory taxation of cable television has been used for the very purpose this Court has feared. CCTA therefore urges the Court to find that the dangers of discriminatory taxation are equally applicable to cable television and to indicate clearly in its decision that any form of discriminatory taxation of cable television unsupported by a valid governmental purpose other than the raising of revenue is unconstitutional.

Respectfully submitted,

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APPENDIX

Tuesday, May 22, 1990 /OC Los Angeles Times

ORANGE COUNTY

ASSESSOR SAYS CABLE TV FIRMS LIE, GOUGE

☐ Assessments: Bradley L. Jacobs lashes back at 'Big Cable' in the face of a TV industry advertising blitz complaining about tax hikes.

By ROSE ELLEN O'CONNOR
Times Staff Writer

SANTA ANA—In the face of a cable industry advertising blitz complaining of higher tax bills, Orange County Assessor Bradley L. Jacobs lashed back Monday, accusing "Big Cable" of violating campaign reform laws by lying to residents and using a monopoly to gouge customers with inflated rates.

"That monopoly allowed Big Cable to raise prices by more than 400% since 1983, and it's about time that the people got some of that back," Jacobs said in a press release.

Jacobs, who is up for reelection in June, has not returned phone calls over the past two weeks and was unavailable for comment Monday.

"The law says that the cable industry has to pay its fair share of taxes just like everyone else," the statement continued, "and I'm going to see that no one gets special treatment just because they have a lot of money to throw around."

Incensed by tax assessments that have climbed by as much as 400% in a single year, the industry spent $50,000

on full-page newspaper advertisements earlier this month urging county residents to complain to Jacobs and the Board of Supervisors. The cable companies have also sent out 800,000 notices to businesses and residents informing them that their cable rates either already have—or soon will—increase as a result of the bigger tax bills. Similar warnings have aired on cable channels.

In addition, the industry has hired a public relations consultant to handle its war against Jacobs. Consultant Harvey Englander angrily dismissed Jacob's counter-attack Monday.

"Brad Jacobs is a damn liar," Englander said, denying that cable company profits have risen as much as Jacobs asserts. "Let's see him prove it," Englander said.

Englander also dismissed Jacobs' charges that a rich and powerful cable industry is trying to place unfair political pressure on him.

"I read it. I just finished laughing," Englander said of Jacobs' campaign press release. "Nowhere anywhere have we talked about his being up for reelection or urged anyone to vote for him or against him. . . . What Mr. Jacobs is doing is trying to hide behind the political reform act to get around free speech."

Cable operators have threatened to sue the county over the assessments. And two weeks ago, industry representatives met privately with county supervisors and urged them to weigh the cost of such a legal battle before agreeing to provide money for Jacobs' defense.

At issue is a method of computing a cable company's property taxes, which was first used by the Orange County tax assessor's office last fall. Under this method, the assessor considers the value of a cable company's exclusive franchise and other intangibles in computing the value of its property and so-called possessory interest. This refers to the value of the public easements the company has been granted to lay cables under roads and other public land.

FIELD STUDY REPORT

THE TAXATION OF MEDIA PROPERTY INTANGIBLES

PREPARED BY:

KAGAN MEDIA APPRAISALS, INC.

January 31, 1990

FINDINGS

Of the 33 documented sales of cable TV systems, radio and television stations and daily newspapers transacted in the subject counties in 1986, 1987 and 1988, sufficient sales price and reassessment data was available to enable a verifiable comparison of 24, including 12 cable systems and 12 non-cable media properties. The information is summarized below.

FINDINGS (Continued)

TABLE 1

Property	Sale Date	Sale Price (SP)	Assessed Value (AV)	AV % of SP	AV (Over)/ Under SP
		$(000)	$(000)		(000)
Cable Systems:					
American Cblsys.	9/87	6,785.0	14,713.1	217%	(7,928.1)
Comcast Cable	6/86	$49,186.0	$90,303.3	184%	$(41,117.3)
Continental Cablvsn.	10/86	12,227.9	17,928.3	147%	(5,700.4)
Post Newsweek Cable	1/86	40,000.0	52,700.0	132%	(12,700.0)
Mountainside Cable	7/87	899.8	1,159.4	129%	(259.6)
Continental Cablvsn.	10/86	15,772.1	19,765.7	125%	(3,993.6)
Falcon Telecable	7/87	6,995.9	8,061.5	115%	(1,065.6)
Jones Intercable	10/87	17,424.0	19,431.9	112%	(2,007.9)
Premiere Cable	3/88	675.0	719.2	107%	(44.2)
Jones Intercable	2/88	19,000.0	19,707.0	104%	(707.0)
Multivision Cable	12/86	59,942.0	59,170.4	99%	771.6
Calvideo Cable	8/88	11,478.5	11,387.9	99%	90.6
Totals		$240,386.3	$315,047.8	131%	$(74,661.5)
Straight Averages		$20,032.2	$26,254.0	131%	$(6,221.8)
Non-Cable Media Properties:					
Daily Pilot	8/88	$10,000.0	$7,461.3	75%	$2,538.7
KNTI-FM	11/88	415.0	287.2	69%	127.8
KOBO-AM	10/88	380.0	135.6	36%	244.4
Daily Transcript	1987	2,750.0	735.6	27%	2,014.4
Press Tribune	1/89	19,000.0	3,980.0	21%	15,020.0
KPLA-AM	11/87	1,100.0	213.8	19%	886.2
Vista Press	1/87	6,317.0	1,190.4	19%	5,126.6
KWTR-AM/KXBX-FM	5/88	1,350.0	226.9	17%	1,123.1
KWIZ-AM/FM	2/88	6,250.0	702.9	11%	5,547.1
KPGA-FM/KVEC-AM	3/88	1,500.0	60.9	4%	1,439.1
KCST-TV	10/87	275,000.0	9,751.5	4%	265,248.5
KWSP-FM	12/88	1,260.0	15.4	1%	1,244.6
Totals		$325,322.0	$24,761.5	8%	$300,560.5
Straight Averages		$27,110.2	$2,063.5	25%	$25,046.7
Avg. Exclu. KCST-TV		$4,574.7	$1,364.5	27%	$3,210.2

FINDINGS (Continued)

This comparison clearly shows a wide disparity in assessment. The cable properties were assessed at an average of 131% of sales price, while the non-cable properties were assessed at an average of only 25%.

Among the non-cable properties, broadcast properties were assessed at an average of 19% of sales price while for newspapers the assessment to sales price ratio averaged 35%. The relatively higher assessment for newspapers is expected given the higher investment in plant, property and equipment required to operate such business versus broadcast properties which often lease facilities and require comparatively minimal investment in operating equipment.

As Table 2 shows, the pattern is also consistent among the counties.

* * * *

CONCLUSIONS

The findings of this study of actual assessments over a three-year period support the following conclusions regarding assessment practice in the 10 subject counties:

1. Cable systems are, as a rule, being assessed on the basis of full enterprise value;
2. Since intangibles constitute a substantial portion of cable system value, cable intangibles are being assessed for property tax purposes;
3. Other comparable media properties, specifically, radio and television stations and daily newspapers are not being assessed at full enterprise value;
4. Since intangibles constitute the largest single class of statutory exemptions, it is reasonable to conclude that the intangibles of comparable media properties are not being assessed;
5. Cable system owners are not being treated equally for property tax purposes with other comparable media business, in general, or with other First Amendment speakers.

(5) (8)

Nos. 90-29, 90-38

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. PLEDGER, COMMISSIONER
OF REVENUES OF ARKANSAS,
Petitioner/Respondent,

v.

DANIEL L. MEDLOCK, *et al.*,
Respondents/Petitioners.

On Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF OF CENTURY COMMUNICATIONS CORP., *ET AL.* AS AMICI CURIAE IN SUPPORT OF PETITIONERS MEDLOCK, *ET AL.* IN CASE NO. 90-38

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 90-29, 90-38

JAMES C. PLEDGER, COMMISSIONER
OF REVENUES OF ARKANSAS,
Petitioner/Respondent,

v.

DANIEL L. MEDLOCK, *et. al.*,
Respondents/Petitioners.

BRIEF OF CENTURY COMMUNICATIONS CORP., *ET AL.* AS AMICI CURIAE IN SUPPORT OF PETITIONERS MEDLOCK, *ET AL.* IN CASE NO. 90-38 *

INTEREST OF THE AMICI CURIAE

The Amici Curiae here, all of whom oppose the imposition by the State of Arkansas of the subject excise tax on cable television services, are trade associations representing cable television operators in their respective states or cable television operators. Together, the Amici represent cable television systems operating nationwide and serving more than ten million subscribing households.

The Amici will be vitally affected by the outcome of these consolidated cases. We support the petitioners

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* The Amici here also support respondents Medlock, *et al.* in Case No. 90-29.

Medlock, *et al.*, in Case No. 90-38 and respondents Medlock, *et al.* in Case No. 90-29, and urge that Section 26-52-301(3)(D)(i) of the Arkansas Code, as in effect January 1, 1990, be declared an unlawful abridgment of the freedom of speech and press. Amici further submit that the version of the subject tax provision immediately preceding the 1989 amendment (*i.e.*, the subject of the petition in Case No. 90-29) is likewise unconstitutional.

SUMMARY OF ARGUMENT

Communication over cable television lines is a function of Press and Speech falling within the protection of the First Amendment to the United States Constitution. Whether the communication consists of a picture or the proverbial thousand words, whether the delivery mode is paper boy, mail, radio wave or cable, and whether the publication is accessed by the consumer as hard copy or by video monitor, the activity is that of Speech and Press. It is, we respectfully submit, the *speaker/editor*, the *message*, the *distribution* and the *public's access*—indeed the breadth of this communicative activity—that are protected from governmental mischief.[1] This constitutionally guaranteed freedom, especially the bar on government's discrimination among press sources, is not related to or conditioned upon the particular medium chosen for mass-distribution of the protected publication.

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[1] *See, e.g., Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976)("[W]here a speaker exists . . . the protection afforded is to the communication to its source and to its recipient"); *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965)("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute [and] the right to receive . . .").

That communications may be distributed among or accessed by the masses through a variety of technologies does not alter the principle that the *process* is fundamentally *one* of speech and press. It is the *process* that is intramurally foreclosed to governmental favor. Legislatively or judicially pigeonholding mass media communicators or publications in order to condone a facially discriminatory tax among the "press" ignores the command of the First Amendment.

ARGUMENT

THE DISPARATE TAXATION OF ALTERNATIVE MEDIA OF MASS COMMUNICATIONS IS AN UNCONSTITUTIONAL ABRIDGMENT OF THE FREEDOM OF SPEECH AND PRESS

At the heart of this case is the ruling by the Supreme Court of Arkansas that it is—

> unwilling to hold that all mass communications media must be taxed in the same way.

Medlock v. Pledger, 301 Ark. 483, 487, 785 S.W.2d 202, 204 (1990); Petitioner Medlock Appendix to certiorari petition 7(a).[2] The court below thus condones as consistent with the First Amendment to the United States Constitution the disparate taxation of competing vehicles of mass communications such as newspapers, magazines, broadcast stations, on the one hand, and cable television services on the other. The State supreme court justifies this scheme solely by categorizing the spectrum of mass media communi-

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[2] All record citations herein refer to the appendix to petitioner Medlock's petition for writ of certiorari, Case No. 90-38, hereafter identified as "Medlock Pet. App."

cators into subgroups consisting of those it perceives as "delivering substantially the same service." *Id.*[3] It is this fragmentation of the "press" to which Amici object. Subdividing the various vehicles of mass communications to accommodate uneven application of a tax on the press is without precedent in this Court.[4]

This is *not* a cable television "franchising" or "market entry" case in the style of *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986), involving "First Amendment values [to be] balanced against competing societal interests".[5] The "fact

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[3] Notably, the trial court below had found "that cable television system operators and subscribers are not entitled to claim the broader First Amendment Protected Rights afforded to the print media", because "cable television programming requires a cable systems use of public property, which along with the distinct and unique benefits gained by cable from use of that property, distinguishes for constitutional purposes cable television from other communications media." Medlock Pet. App. 19a. Of course, virtually all mass media businesses utilize "public property" in the distribution process. *E.g.*, *City of Lakewood* v. *Plain Dealer Pub. Co.*, 108 S. Ct. 2138 (1988) (coin operated distribution boxes on city streets). Cable systems pay substantial consideration for their use of public property. *E.g.*, 47 U.S.C. §§ 531 ("Cable Channels for Public, Educational or Governmental Use"), 542 ("Franchise Fees").

[4] Carrying the State supreme court's rationale to its logical conclusion would permit taxation of print or broadcast media and exemption of competitive cable TV media.

[5] *Preferred Communications* raised, but left undecided, issues regarding the permissible nature of a city's franchising powers and the extent to which local authorities might condition installation and operation of a cable television system over public streets. As the appellate court below stated, "those [franchising] cases involve regulation related to access or use of the rights of way rather than a tax which has no relationship to the ac-

that cable television uses public property and must obtain a[local] franchise to do so," 301 Ark. at 485, 785 S.W.2d at 203, Medlock Pet. App. 5a, was rejected by the appellate court below as justification for differential tax treatment of the respective media.

The issue presented here is whether the *discriminatory* application of the tax among competing organs of mass communications—particularly as such tax selectively falls on the public consumer of such product—violates the Constitution's guarantee of a free press.[6] This question is a refinement of that First Amendment issue left "undecided" by the Court in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 222, 233 (1987), *i.e.*, "whether a distinction between different types of periodicals presents . . . [a] basis for invalidating the sales tax, as applied to the press".

The trial court found below that the Constitution's protection of the press is the special preserve of the print media. Medlock Pet. App. 19a ("the Court must conclude that cable television system operators and subscribers are not entitled to claim the broader First Amendment Protected Rights afforded to the print media"). In holding that the First Amendment's bar on "discriminatory taxation" pertains only "among the purveyors of a particular medium", 301 Ark. at 487, 785 S.W.2d at 204, Medlock Pet. App. 7a, the State supreme court unduly, and without warrant,

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quisition of the privilege of using public property." 301 Ark. at 485, 785 S.W.2d at 203, Petitioner Medlock App. 5a.

[6] Those First Amendment claims pressed here are obviously intertwined with interests arising under the Equal Protection Clause. *See, e.g., Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 94-95 (1972).

dilutes the Constitution's protection of speech and press, thereby perpetuating the trial court's error.[7]

In Arkansas, "cable television" and "any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users" are legislatively grouped, segregated from other mass media services, and subjected to an excise tax from which the others are explicitly exempt. Ark. Code Ann. §§ 26-52-301(3)(D)(i), 26-52-401(4) and (13) (Supp. 1989), Medlock Pet. App. 24a - 25a. Subscriptions by Arkansas residents for home-delivery of the *Little Rock Gazette*, the largest daily newspaper in the State, or *Good Housekeeping* are tax-exempt while subscription to the local cable TV service is taxed.[8] Within the range of available mass media offerings in Arkansas, the excise tax targets and financially burdens predominately those who elect to access cable media.[9]

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[7] Substantively distinguishing "press" rights on the basis of "a particular medium" is not unlike conditioning a speaker's right of expression on the technical specifications of the "soapbox".

[8] Under the taxing scheme at issue, residents of Arkansas choosing to obtain their news from local newspapers are favored over those relying upon, for example, Cable News Network or C-SPAN. That the former may physically be delivered to the home while the latter are transmitted over closed-circuit cable is not, we submit, a valid ground for *constitutional* distinction.

[9] The State of Arkansas is currently served by 252 cable television systems furnishing service to 437,992 subscribers. This represents 48.9 percent of the TV households in the State. Source: Warren Publishing, Inc., 58 *Television & Cable Factbook*, Cable & Services Volume, at C-386 (1990). Arkansas is not atypical of the U.S. It is generally estimated that approximately 55-

Accordingly, the tax unevenly affects not only the business of speech and press but also those citizens who may, for whatever reason, prefer to receive their news and entertainment through cable television services rather than from the local newspaper.[10] As this Court recognized in *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986), a cable operator, "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, seeks to communicate messages on a wide variety of topics and in a wide variety of formats".[11] The Court has consistently made it clear that the primary focus of the First Amendment is protection of the public. In *Red Lion Broadcasting Co.* v. *F.C.C.*, the Court said:

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60 percent of the TV households in the nation currently subscribe to cable television services. *Id.*

[10] A recently published national survey produced two findings demonstrating the consumers' dependence upon video transmissions as their source of news and information. Sixty-five percent of those surveyed stated that their primary source of news was "television" (including cable television) while only 42 percent indicated newspapers to be their primary source of news. Second, when asked to compare "regular" (broadcast) television with cable television, 33 percent stated that cable television provided better national news coverage while 11 percent stated that cable television provided better *local* news coverage than broadcast television. The Roper Organization, *The 1989 TIO/Roper Report* 14, 23, 27 (1989).

[11] That cable television is a full fledged "member" of the press is beyond question. Among the information sources currently available for publication via cable media are 69 programming networks distributed nationwide by satellite communication. Source: National Cable Television Association, *Cable Television Developments* at 7-A (Oct. 1990). Cable operators, in addition, typically originate programming for publication. *See also infra* note 18.

> It is the right of viewers and listeners, not the right of broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences . . . [and t]hat right may not constitutionally be abridged . . .

395 U.S. 367, 390 (1969).[12] When Arkansas, by affirmative law or exemption, substantively differentiates between mass media outlets and grants a preference to print publications as the source of "social, political, esthetic, moral and other ideas and experiences" *vis-a-vis* alternative organs because the latter communicate electronically, it unconstitutionally abridges "the right of the public" to access the media of choice.[13]

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[12] *See also National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973). These cases, along with *Red Lion*, provide the genesis of the so-called "scarcity doctrine."

[13] The scarcity doctrine, sometimes applied to justify a diminishment in the First Amendment rights of broadcast licensees, is a recognition of the practical disparity between the relative abilities of the broadcaster and the ordinary citizen to "speak." Its purpose is to impart some balance between the privileged licensee and the public. *Columbia Broadcasting System*, 412 U.S. at 101, 125 ("Unlike other media, broadcasting is subject to an inherent physical limitation . . . [and therefore a]ll who possess the . . . desire to communicate cannot be satisfactorily accommodated")("the public interest . . . requires periodic accountability on the part of those entrusted with the use of broadcast frequencies, scarce as they are"). The "periodic accountability" of the broadcast licensee, and the responsibility assumed to operate in the public interest, do not bear on the constitutional

Selectively taxing the *consumer* of mass communications, especially when the determinative factor is the "particular medium" of access, 301 Ark. at 487, 785 S.W.2d at 204, Medlock Pet. App. 7a, is analogous, if not identical, to that intra-press discrimination condemned as unconstitutional in *Minneapolis Star and Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) and *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 222 (1987). Although the tax in *Minneapolis Star* was not a "general sales tax", the Court's holding turned on the fact that the "ink and paper" tax unevenly burdened the press because it differentiated among publications based on governmentally-established criteria.[14] By contrast, the Arkansas tax is a "general tax". But the same defect that was adjudged constitutionally to invalidate the Minnesota statute is equally present in the Arkansas law. It is Arkansas' *exemption* of select media from the tax that creates the invidious discrimination among the press. Arkansas' scheme, like the unconstitutional tax at issue in *Minneapolis Star*, arbitrarily classifies the press in order to manufacture a distinction between its various components.

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obligation of the state to avoid uneven taxation of the press. *See also Bolger* v. *Young Drug Products Corp.*, 463 U.S. 60, 74 (1983)("Our decisions have recognized that the special interests of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication" (footnote omitted)).

[14] 460 U.S. 592-93 ("A tax that singles out the press or that targets individual publications within the press, places a heavy burden on the State to justify its action"). In this case, Arkansas proffers no "compelling" reason to justify its disparate taxation of mass media communicators and communications.

The State's highest court, appropriately recognizing below "that the press may be subjected to taxation but not if the tax is discriminatory", 301 Ark. at 486, 785 S.W.2d at 204, Medlock Pet. App. 6a, nonetheless approves the overt discrimination between the various vehicles of mass communications because it finds the respective press "classifications" at issue to be "dissimilar."[15] The result is that those speaking through print or broadcast media are distinguished from and preferred over those communicating via closed-circuit cable lines.[16] Likewise, those consumers electing to avail themselves of cable television service as an alternative, or even as a supplement, to delivery of the local newspaper, suffer the discriminatory effects of the contested tax.[17]

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[15] At least one state considered cable television sufficiently similar and competitive to newspapers that it prohibited "newspaper media and their affiliates" from obtaining a cable franchise in their "major circulation areas." Mass. Gen. L. ch. 166A, § 1(e) (1979).

[16] The motivation of the State to tax certain media and to relieve others, if indeed there be any motive at all, "is not the *sine qua non* of a violation of the First Amendment". *Minneapolis Star and Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). Whether the newspaper/magazine/broadcast lobby in the State may have sufficient political clout to persuade the legislature to exempt their product from the tax is therefore irrelevant. It is the uneven treatment between components of the press, and the failure of the State to meet its "heavy burden" of justification, *ante* note 14, that is *per se* unconstitutional. *Id.* at 591-2.

[17] *See, e.g.*, *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 399-400 (1968); *Teleprompter Corp.* v. *C.B.S., Inc.*, 415 U.S. 394, 408 (1974). Today, of course, cable systems offer substantially more than enhanced reception of broadcast signals.

Indeed, in rural areas, some residents may be motivated to subscribe to cable services to enable, or technically enhance, reception of those broadcast services freely available off-the-air in the more populous regions.[18] Electronically published communications are not constitutionally inferior (or superior) to those distributed via print media. Likewise, public consumers accessing the electronic press are not properly the objects of tax discrimination *vis-a-vis* those who choose the medium of print. It is not the role of Government selectively to promote or endorse one media outlet over another.

Seventeen years ago, well before the advent of cable television distribution of satellite communications—the single most significant development resulting in the explosion of electronic publishing—a justice of this Court said:

> My conclusion is that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. The philosophy of the First Amendment requires that result, for the fear that Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications.

Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94, 148 (1973)(Douglas, J., concurring).[19] It is this principle that the judg-

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[18] Thus, those cable subscribers disadvantageously located in a geographical sense are further penalized by the State's selective tax on their reception of broadcast communications.

[19] Two cable systems, one in Vero Beach, Florida and the other

ments below fundamentally dispute. Both lower courts would subordinate the cable publisher/editor, as well as the consumer of such media services, to second-class status under the First Amendment. Each is satisfied that the State may overtly discriminate in taxing print and electronic media. Each is of the view that the electronically published press is *constitutionally* different from and inferior to the print media.

This is, we respectfully reiterate, not a case involving the powers of local government to franchise or regulate cable television. Neither is it a facial challenge to the authority of government to tax communications media. Rather, the issue presented is whether those mass media communications electronically published, and the providers/consumers of such press, hold a lesser stature under the Speech and Press Clause of the First Amendment than that afforded print media.

By taxing only designated distribution technologies of mass communications and exempting other competitive media, Arkansas' excise tax facially favors select elements of the press to the direct prejudice of others and is therefore unconstitutional.

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in Jackson, Mississippi, were the first to furnish subscribers with programming distributed via communications satellite. The date was October 1, 1975 and the inaugural program was the "Thrilla From Manilla", the live Heavyweight Championship Fight between Muhammad Ali and Joe Frazier. Today, nearly all the nation's 6,000 cable systems offer a diverse menu of satellite-provided cable networks plus a mix of locally originated programming. Clearly, the information transmitted over the typical cable system matches or exceeds that contained in the pages of even the largest newspapers. *See ante* notes 10 and 11.

CONCLUSION

Arkansas' current scheme of taxation of communications media discriminates among elements of the press thereby unconstitutionally abridging rights protected under the First Amendment.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1990

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS,

Petitioner,

v.

DANIEL L. MEDLOCK, *et al.*,

Respondents,

- and -

DANIEL L. MEDLOCK, *et al.*,

Petitioners,

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF OF AMICI CURIAE CABLEVISION INDUSTRIES CORP., COMCAST CORPORATION, AND COX COMMUNICATIONS, INC. IN SUPPORT OF PETITIONERS-RESPONDENTS DANIEL L. MEDLOCK, *ET AL.*

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QUESTION PRESENTED

In Arkansas, a three percent state sales tax is imposed on cable television subscriptions. Under the State's taxing scheme, newspapers, magazines, and television and radio broadcasting are not subject to this tax. The question presented is whether, absent a compelling State interest, this differential taxation of cable television violates the guarantees of freedom of speech and of the press under the First Amendment to the United States Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 90-29
90-38
(Consolidated)

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS,

Petitioner,

v.

DANIEL L. MEDLOCK, *et al.*,

Respondents.

- and -

DANIEL L. MEDLOCK, *et al.*,

Petitioners,

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF OF AMICI CURIAE CABLEVISION INDUSTRIES CORP., COMCAST CORPORATION, AND COX COMMUNICATIONS, INC. IN SUPPORT OF PETITIONERS-RESPONDENTS DANIEL L. MEDLOCK, *ET AL.*

INTEREST OF AMICI

Cablevision Industries Corp. ("Cablevision"), Comcast Corporation ("Comcast"), and Cox Communications, Inc. ("Cox") are three of the largest multi-system cable television operators in the United States. Cablevision owns or has management responsibility for cable television systems in 18 states[1] which serve approximately one million subscribers. Comcast owns and has management responsibility for cable television systems in 18 states[2] which serve more than 2.5 million subscribers. Cox operates cable television systems in 16 states[3] and provides cable television to more than 1.5 million subscribers.[4]

As described below, 12 states tax the cable television operations of Cablevision, Comcast, and Cox but do not subject other mass communicators, such as newspapers, magazines, and broadcasters, to these taxes. These taxing structures are generally of recent

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[1] The states in which Cablevision operates cable television systems include Alabama, California, Florida, Georgia, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Nebraska, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia.

[2] The states in which Comcast owns or has management responsibility for cable television systems include Alabama, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, New Jersey, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia.

[3] The states in which Cox operates cable television systems include California, Connecticut, Florida, Georgia, Illinois, Iowa, Louisiana, Michigan, Nebraska, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Virginia, and Washington.

[4] Letters from the parties to this proceeding consenting to the filing of this brief have been filed with the Clerk of this Court.

vintage as one state after another has begun to single out cable television as a source of increased revenue. They have been and continue to be the subject of administrative and judicial First Amendment challenges in the various states. The decision in this case will establish the constitutional guidelines against which existing taxes will be judged and by which state legislatures will be guided in structuring future taxing schemes. Most importantly, then, this case concerns the right of cable television operators to communicate information and ideas on the same basis as other mass communicators, free of the inhibiting effects of differential taxation.

STATEMENT OF THE CASE

Since 1941, Arkansas has imposed a sales tax on all tangible personal property and on certain enumerated services. In 1987, the Arkansas General Assembly adopted Act 188 of 1987, amending the Arkansas Gross Receipts Tax of 1941 by adding cable television service to the list of services subject to the tax. Ark. Stat. Ann. § 26-52-301(3)(D) (1987). Subsection (D) provided for the levy of a three percent tax upon gross proceeds or gross receipts derived from sales of cable television services. *Id.*[5] Section 26-52-401 expressly exempted from the sales tax: (1) gross receipts or gross proceeds derived from the sale of newspapers; (2) gross proceeds derived from sales of advertising space in newspapers and publications and

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[5] Other services subject to the sales tax include telephone service; the service of furnishing rooms by hotels, apartments, lodging houses, and tourist camps; and the service of alteration, addition, cleaning, refinishing, replacement, and repair of motor vehicles. Ark. Stat. Ann. § 26-52-301(3).

billboard advertising services; and (3) religious, professional, trade and sports journals and publications printed and published within the State and sold through regular subscriptions. Ark. Stat. Ann. §§ 26-52-401(4), (13), (14).[6] On March 21, 1989, by Act 769, the Arkansas General Assembly further amended the gross receipts tax to include satellite broadcast television subscription services[7] within the provision taxing cable television service.[8]

Petitioners-Respondents Daniel L. Medlock, Community Communications Co., and the Arkansas Cable Television Association, Inc. (hereinafter "the Medlock

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[6] Notwithstanding this Court's decision in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), section 26-52-401 has never been amended to expand the exemptions from the sales tax to include all subscription magazines.

[7] Satellite broadcast television systems, also known as satellite master antenna television (hereinafter "SMATV") systems, employ a central dish antenna that receives television signals from a satellite in fixed orbit. Satellite dish antennas may be located at the building site, or signals may be received by microwave through small receiving antennas on top of the building. The signal is thereafter distributed by wire to subscribers who pay a fee for the service.

[8] As amended by Act 769, effective July 1, 1989, the tax applied to "community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers . . . ." Ark. Stat. Ann. § 26-52-301(3)(D)(i) (Supp. 1989).

Because the Arkansas legislature did not enact a corresponding amendment to the Arkansas use tax, subscription fees for SMATV are subject to Arkansas's sales tax only when they are paid to an in-state collecting agent, *e.g.*, a local cable operator. Subscription fees charged for SMATV to subscribers located in Arkansas, therefore, are not taxed when they are paid by the Arkansas subscriber directly to an out-of-state provider.

petitioners") challenged Act 188 as violative, *inter alia*, of their rights of freedom of speech and freedom of the press guaranteed by the First Amendment to the United States Constitution. The trial court applied the four prong test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), for determining whether governmental regulation passes constitutional muster under the First Amendment, and held that Arkansas's stated interest in raising revenues was a sufficiently compelling governmental interest to justify the burden of the tax on cable television operators' First Amendment rights. *Medlock v. Pledger*, No. 87-2401 (Ch. Ct. Pulaski Cty., Div. 1, Mar. 10, 1989), *reproduced in* Petition for Certiorari at 20a-21a, *Medlock v. Pledger* (No. 90-38).

On appeal to the Arkansas Supreme Court, the Medlock petitioners requested a finding that the Arkansas taxing scheme was unconstitutional because both before and after its amendment it taxed the provision of cable service while exempting the sale of newspapers and other publications. The Arkansas Supreme Court found the tax on cable television to be unconstitutional prior to the 1989 amendment, but on a narrower ground. The court reasoned that it did not apply to SMATV and "a tax which discriminates between mass communicators delivering substantially the same service runs afoul of the First Amendment . . . ." *Medlock v. Pledger*, 301 Ark. 483, 487, 785 S.W.2d 202, 204 (1990), *cert. granted*, ___ U.S. ___, 111 S. Ct. 41 (1990), *and cert. granted*, ___ U.S. ___, 111 S. Ct. 42 (1990).[9] According to the court, the

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[9] The court concluded that the mere fact that cable service uses public rights-of-way is irrelevant to a determination of

inclusion of SMATV within the provision taxing cable television by Act 769 cured the constitutional infirmity. *Id.*

Notwithstanding this conclusion regarding the constitutionality of the tax as amended, the court professed an unwillingness to consider the Medlock petitioners' position that the tax impermissibly differentiated between cable television and newspapers and magazines because that would have called into question the validity of Act 769, which had not been before the trial court and, therefore, was not before the Arkansas Supreme Court. *Id.* The court nonetheless went on to state its opposition to a holding that "all mass communications media must be taxed in the same way." *Id.*

SUMMARY OF THE ARGUMENT

This case concerns the differential taxation of cable television in Arkansas. Many other state taxing schemes also single out cable television for taxation or treat cable differently from other communications media for taxing purposes. While other forms of media such as newspapers and magazines may be taxed, the tax must be a generally applicable one, and this Court's decisions hold that for a differential tax on newspapers and magazines to survive constitutional scrutiny, it must further a substantial governmental interest. There is no justification under the First Amendment for differential treatment of cable television in the taxing area. Providers of cable television service engage in the same types of First Amendment

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whether the sales tax on cable service, which exempts other communications media, is constitutional. 301 Ark. at 485-86, 785 S.W.2d at 203.

activity as do other mass communicators, such as newspapers, magazines, and radio and television broadcasters. In providing news, information, entertainment, and other ideas, cable television operators have the very same First Amendment rights as other media providers, and the rights of some media providers are not more worthy of protection than others. Thus, cable television operators, like newspapers and magazines, are also entitled to have their First Amendment rights protected from the unwarranted burdens of discriminatory state and local taxing schemes.

In determining whether cable television operators are entitled to First Amendment protection from differential taxation, the Court need not determine the full extent of First Amendment protection for cable television in all areas of economic regulation, including such matters as franchising and access.[10] Equally so, in order to protect cable television from the inhibiting effects of differential taxation presented by this case, the Court need not conclude generally that

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[10] Indeed, this is not the appropriate case for the Court to determine the extent of First Amendment protection for cable television in any areas other than taxation. As the Court recognized in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), before the Court can resolve the constitutional issues concerning cable television in the franchising area, the factual issues unique to a franchising case must be fully developed. Consequently, in *Preferred Communications* the Court remanded the case to the United States District Court for the Central District of California for development of the record with regard to the uses of the public utility poles and rights-of-way and how the petitioner cable company proposes to install and maintain its facilities on them. *Id.* at 496. That case is pending before the district court.

cable television is an "electronic newspaper" or "magazine" for all regulatory purposes such that the First Amendment implications affecting the regulation of the print media are also applicable to cable. Whatever unique special characteristics might justify other regulatory measures on cable television which would not be justified with respect to other media, they certainly do not justify burdening cable television operators with differential taxation. Accordingly, the Court should hold the Arkansas sales tax on cable television, both before and after its amendment, constitutionally impermissible because it discriminates against cable television without advancing a sufficiently compelling governmental interest.

ARGUMENT

I. Cable Television Is Subject to Differential Taxation Under the Taxing Schemes of Numerous States.

Cablevision, Comcast, and Cox are subject to a broad array of state and local taxing schemes that tax cable television differently from other mass communications media. A non-exhaustive summary of these taxing schemes follows:

1. Florida, Nebraska, Rhode Island, South Carolina, and Texas each impose a sales tax on cable television service.[11] The sales tax rates are five and six percent, with some localities within the states levying an additional .5 percent to 2.5 percent sales tax. In each

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[11] *See* Fla. Stat. Ann. § 212.05 (West 1989); Neb. Rev. Stat. §§ 77-2702, 2703 (1986); R.I. Gen. Laws §§ 44-18-12, 13, 18 (1989 & Supp. 1990); S.C. Code Ann. §§ 12-35-140, 510 (Law. Co-op. 1976); Tex. Tax Code Ann. §§ 151.0101, .051 (Vernon 1982 & Supp. 1990).

of these states newspaper circulation and advertising are exempted by statute from the sales tax.[12] In addition, Florida, Nebraska, Rhode Island, and Texas exempt certain newspaper production materials, supplies, equipment, and other items involved in the production of newspapers from the sales tax.[13]

2. In Pennsylvania, cable television is subject to both capital stock and sales taxes. Pennsylvania taxes corporations at the rate of nine mills upon each dollar of defined capital stock value. 72 Pa. Cons. Stat. Ann. § 7602 (Purdon 1990). The tax exempts the corporate stock of entities organized for manufacturing or processing. "Processing" is defined to include the publishing of books, newspapers, magazines or other periodicals, printing, and broadcasting radio and television programs by licensed commercial or educational stations. *Id.* § 7601(11).

In addition, Pennsylvania exempts from its sales and use tax all transfers for the purpose of manufacturing and processing. *Id.* § 7201. Under the sales tax exemption, "processing" is defined to include the broadcasting of radio and television programs of licensed commercial and educational stations. The Pennsylvania Department of Revenue regulations defining "licensed commercial or educational stations"

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[12] *See* Fla. Stat. Ann. § 212.08(7)(w) (West 1989); Neb. Rev. Stat. § 77-2704(d) (1986); R.I. Gen. Laws § 44-18-30(B) (Supp. 1990); S.C. Code Ann. § 12-35-550(7) (Law. Co-op. Supp. 1989); Tex. Tax Code Ann. §§ 151.319(a), (f) (Vernon 1982 & Supp. 1990).

[13] *See* Fla. Stat. Ann. § 212.08(7)(v)(2) (West Supp. 1990); Neb. Rev. Stat. § 77-2702(11)(a) (1986); R.I. Gen. Laws § 44-18-30(H) (Supp. 1990); Tex. Tax Code Ann. § 151.319(d) (Vernon 1982 & Supp. 1990).

and "broadcast" specifically provide that registered cable television companies operating under the authority of the Federal Communications Commission ("FCC") are not considered licensed commercial or educational stations.[14] Accordingly, cable television operators are subject to both the capital stock and sales taxes, whereas newspapers, magazines, and radio and television broadcasters are not.

3. In Connecticut, cable television service is subject to an eight percent sales tax, although other regulated services including gas, water, and most electric services are exempt. Conn. Gen. Stat. §§ 12-407, 12-412(3) (1989). The sales tax does not reach certain other suppliers of video programming, such as SMATV, direct broadcast satellite ("DBS"),[15] multichannel, multipoint distribution systems ("MMDS"),[16] and satellite services. Newspapers and subscription

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[14] A recent decision of the Commonwealth Court of Pennsylvania held that there is no statutory difference between a cable television operator and a licensed commercial or educational station and, therefore, that cable is entitled to the statutory exemption for both the capital stock and the sales and use taxes. An appeal of this decision is pending in the Pennsylvania Supreme Court. *Suburban Cable TV Co. v. Commonwealth*, 131 Pa. Commw. 368, 570 A.2d 601 (1990), *juris. noted*, Pa. Sup. Ct., Sept. 4, 1990.

[15] DBS systems permit individuals to receive satellite delivered television programming through a small receiving dish antenna for a subscription fee.

[16] MMDS involves over-the-air microwave transmission of television programming from one point to multiple receiving points. Since line of sight, or direct or unobstructed, transmission is required, subscribers require a rooftop apparatus to receive the microwave transmissions.

magazines are also exempt from the sales tax. *Id.* § 12-412(6).

In addition, cable operators are subject to a gross earnings tax, although generally exempt from personal property taxes. *Id.* §§ 12-256, 12-268. Prior to January 1, 1990, both cable operators and regulated telecommunications services were subject to a nine percent gross earnings tax and both were exempted from personal property taxes. Since January 1, 1990, cable operators have been subject to a five percent gross earnings tax, whereas regulated and unregulated telecommunications services are not subject to the tax. Video programming providers of SMATV, DBS, MMDS, and satellite services are not subject to the gross earnings tax. Nor are newspapers, magazines, and broadcast television. Although cable television operators are exempted from personal property tax and other communications media are not, the gross earnings and personal property taxes tax cable television operators differently from other communications media.

4. In 1990, the Kentucky General Assembly amended the utility tax to make cable television subject to the tax. Ky. Rev. Stat. Ann. § 160.614 (Michie/Bobbs-Merrill Supp. 1990). The tax levied is up to three percent of the utility's gross receipts. *Id.* § 160.613 (Supp. 1990). Initially, the Governor of Kentucky proposed amending the general sales tax to include cable television, radio, broadcast television, and newsprint services and advertising. This proposal was defeated and, subsequently, the legislature amended the utility tax to include only cable television. Unlike other utilities subject to the tax, however, cable television is not permitted to pass the three

percent tax through to its customers. *Compare* Ky. Rev. Stat. Ann. § 160.613 *and* § 160.617 *with* § 160.614 (Michie/Bobbs-Merrill 1987 & Supp. 1990).

In addition, cable television is subject to the Kentucky public service tax. Ky. Rev. Stat. Ann. § 136.120 (Michie/Bobbs-Merrill 1982 & Supp. 1990). The public service tax serves to classify a subject entity's property for purposes of *ad valorem* taxes. *See id.* Under the property classification scheme, a cable system's property is divided into three categories: (i) operating property; (ii) non-operating tangible property; and (iii) non-operating intangible property. *Id.* § 136.120(2). The first two categories are subject to both state and local property taxes, whereas the third category is subject only to state property taxes. *Id.* Operating property is specifically defined to include both operating tangible property and the franchise. *Id.* § 136.115(2) (Michie/Bobbs-Merrill 1982). Thus, cable television alone, unlike any other medium of mass communication such as newspapers, magazines, and radio and television broadcasting, is subject to taxation on its goodwill and going concern value by the State at the rate for tangible property of 45¢ per $100 of value, with county and local rates currently adding up to an additional 90¢ per $100 of value. Other mass communications media are not taxed on these intangible assets, regardless of whether they were generated over time or acquired. *Id.* § 136.120 (Michie/Bobbs-Merrill Supp. 1990).

5. Indiana imposes a gross income tax on the gross receipts a taxpayer receives from trades, businesses or commerce in Indiana. Ind. Code Ann. § 6-2.1-1-2(a) (West 1989). Virtually all enterprises in Indiana, including cable television operators, radio and television

broadcasters, and members of the newsprint media, are subject to the tax. Although all members of the mass communications media in Indiana are subject to the tax, cable operators are taxed at the higher rate of 1.2 percent, whereas other media are taxed at the lower rate of .3 percent.

Indiana also imposes an excise tax of five percent on gross retail income. *Id.* § 6-2.5-2-1. The tax applies to each "retail merchant" who is defined as "[a] person . . . making a retail transaction when he engages in selling at retail." *Id.* § 6-2.5-4-1(a). Cable television operators are included specifically in the definition of retail merchants. *Id.* § 6-2.5-4-11. The advertising sales of radio and television broadcasters are not subject to the tax by definition. Newspaper sales are expressly exempted from the tax.

6. Michigan imposes a use tax for "the privilege of using, storing or consuming tangible personal property in" the State of Michigan. Mich. Comp. Laws Ann. § 205.93(1) (West 1986). The tax is equal to four percent of the price of the property. The statute specifically exempts "[p]roperty purchased by persons licensed to operate a commercial radio or television station when the property is used in the origination or integration of the various sources of program material for commercial, radio or television transmission." *Id.* § 205.94(o) (Supp. 1990). The Michigan Department of Revenue has concluded that the phrase "licensed to operate a commercial radio or television station," does not include cable television systems because they are not "licensed" by the FCC.

7. In California, intangible assets are exempt from property taxation, and businesses other than cable television, including non-cable media, are not taxed

on their intangible assets. As part of the tax on their tangible personal and real property, cable television operators are taxed on the possessory interests they are held to have in the public rights-of-way they utilize under their franchises in constructing and operating their cable systems. Cal. Rev. & Tax. Code, § 107.7 (Deering 1989). Some county assessors have ignored the intangible asset exemption and equate the value of the possessory interest of a cable television system with the market value or purchase price of the entire cable system, which includes the value of intangible assets such as the operator's franchise or license to engage in the cable television business. The property tax assessments of newspapers, magazines, and radio and television broadcasters do not include taxation of such intangible assets.

8. In Virginia, a number of local governments require cable television operators to pay a business license tax, in addition to the franchise fee authorized by the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521, 543 (1988). Businesses engaged in "printing or publishing any newspaper, magazine, newsletter or other publication . . . or operating or conducting any radio or television broadcasting station or service" are exempted from paying the business license tax. Va. Code Ann. § 58.1-3703(B)(3) (Supp. 1990).

In addition, the City of Norfolk recently amended Norfolk City Ordinance No. 36,026 to include cable television service within the definition of "utility service." As a result, cable television service is additionally taxed as a utility at a rate of seven percent, excluding any charge made for remote control tuning

devices. No other mass communications media are subject to the utility tax.[17]

II. A Sales Tax on Cable Television Service That Exempts Newspapers and Subscription Magazines Violates the First Amendment to the Constitution of the United States by Singling Out Cable Television for Differential Taxation.

A. The Constitutionality of a Tax on Cable Television Must Be Determined Under the *Minneapolis Star* and *Arkansas Writers' Project* Principles.

The examples of state taxing schemes described in Section I above present a variety of ways in which states have singled out cable television from among other mass communications media and subjected it to differential taxation. For the reasons set out in this section, such schemes, like the Arkansas sales tax on cable television, must be judged by the standards articulated in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

Cable television operators engage in conduct protected by the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1444 (D.C. Cir. 1985), *cert. denied sub nom. National*

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[17] Many of these state taxing schemes further burden cable television operators because the disputed tax must be paid before the tax assessment can be challenged. In California, for example, a cable operator may be required to pay millions of dollars in disputed taxes and then sue for a refund. Even if the taxpayer prevails and is entitled to a refund, the interest paid on the refunded monies is at a rate less than the State has earned on the refunded amount.

Ass'n of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986); *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). The business of cable television, like that of broadcasters, newspapers, and magazines, is to make available to the public a mixture of news, information, and entertainment. Like these entities, cable television operators, such as Cablevision, Comcast, and Cox, editorially select and retransmit local broadcast signals, choosing stations to carry from among the three major network affiliates, Fox affiliates and other commercial independents, and local public television stations. In addition, amici select signals from distant independent, specialty, and educational broadcast stations. Amici make editorial decisions regarding the selection of program networks via satellite, such as Home Box Office, CNN, and C-SPAN, as well as satellite-delivered pay-per-view services. Finally, amici provide programming of their own creation and facilitate the transmission of locally originated programming, including local news events, community features, and live or videotaped public service and entertainment programs.[18]

As a result of cable television's expanded role in more recent years, it is now settled that "the activities . . . [of cable television] plainly implicate First Amendment interests." *Preferred Communications*, 476 U.S. at 494.[19] As this Court stated:

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[18] Indeed, there is no substantive difference between these editorial decisions and those made, for example, by newspapers in determining which wire service articles to reprint and which syndicated columns to publish.

[19] The Court's conclusion is consistent with the opinion of Congress, as expressed in the legislative history of the Cable Com-

> [T]hrough original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [cable] seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." [citation omitted] Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment in *Red Lion Broadcasting, Co. v. FCC*, ...

475 U.S. at 494-95. It is not surprising, therefore, that cable television generally has been accorded a

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munications Policy Act of 1984:

> As we enter the "information age" access to telecommunications networks has become increasingly important to full participation in the political, economic, social and cultural life of the nation. The First Amendment's guarantee of a free flow of diverse ideas will be reduced to an empty promise if access to information is not available to all our citizens.

H.R. Rep. No. 98-934, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Admin. News 4673. If the current trend of singling out cable television for taxation continues unchecked, the corresponding increase in the cost of services will push cable access beyond the reach of many Americans, contrary to Congress's express desire.

high level of constitutional protection. *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (holding that "must-carry" rules must, at the very least, "advance a substantial governmental interest and must be no more restrictive than necessary to accomplish that end.") (citing *O'Brien*, 391 U.S. at 377), *cert. denied sub nom. Office of Communication of United Church of Christ v. FCC*, 486 U.S. 1032 (1988); *Quincy Cable TV, Inc.*, 768 F.2d 1434 (ruling that the "scarcity doctrine" does not apply to cable television and that cable "must-carry" rules therefore must withstand greater scrutiny than is applied to broadcast media access regulations; *Century Federal, Inc. v. Palo Alto*, 648 F. Supp. 1465 (N.D. Cal. 1986) (applying *O'Brien* test in holding exclusive cable franchising agreement unconstitutional).

The present case, however, does more than implicate First Amendment interests. In *Preferred Communications*, the question was whether someone desiring to provide cable television service, and denied a franchise to do so because of a city-imposed limit on the number of cable franchises, had presented a colorable First Amendment claim sufficient to survive a motion to dismiss. This case concerns those who have acquired cable television franchises and are in fact engaging in "speech and the communication of ideas." Cable television operators are thus exercising the very "rights protected under the First Amendment" addressed in *Minneapolis Star*, 460 U.S. at 582 and *Arkansas Writers' Project*, 481 U.S. at 227-32.

It is equally true that any tax to which cable operators are subject imposes some burden on their First

Amendment rights.[20] Since the protection of their First Amendment rights is at issue here, the principle of *Minneapolis Star* and *Arkansas Writers' Project* that a taxing scheme which discriminates among members of the press is unconstitutional is equally applicable to a taxing scheme such as the present one which singles out cable television for taxation while exempting newspapers and magazines. In *Minneapolis Star*, the Court stated the operative rule:

> A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. [citation omitted] Any tax that the press must pay, of course, imposes some "burden."

460 U.S. at 582-83. The *Minneapolis Star* two-part inquiry thus should be undertaken to determine whether the burden of the Arkansas sales tax on cable television is permissible: first, under the tax scheme at issue, is cable television merely subject to a tax of general applicability or has it been "singled out" for "special treatment"; and, second, if cable is the subject of differential tax treatment, has the State

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[20] This, of course, does not mean that cable television is free from taxation or other economic regulations. Rather, it means that it is subject to generally applicable taxes, as are newspapers and magazines, and other legitimate economic regulations. Such generally applicable economic regulations include antitrust laws, the Fair Labor Standards Act, and enforcement of subpoenas. *Minneapolis Star*, 460 U.S. at 581. Such regulations do not single out First Amendment speakers, but apply generally to all businesses.

met its burden of demonstrating that the tax "is necessary to achieve an overriding governmental interest." 460 U.S. at 582.

B. Judicial Decisions Applying *Minneapolis Star* and *Arkansas Writers' Project* Support Their Application in This Case.

Recently, state and lower federal courts have applied this Court's *Minneapolis Star* and *Arkansas Writers' Project* principles to invalidate taxing schemes that discriminate among, as well as against, mass media communicators. For example, the Florida Supreme Court held that a sales tax on magazines which exempted newspapers violated the First Amendment. *Department of Revenue v. Magazine Publishers of America, Inc.*, ___ Fla. ___, 565 So.2d 1304 (1990). Using the strict scrutiny standard, the Florida court determined that the differential taxation was constitutionally impermissible because the State could not identify a counterbalancing interest of compelling importance that it could not achieve through means other than differential taxation. *Id.* at 1308. The only interest the State asserted to justify the scheme was the public interest in promoting publishers who engage in the immediate dissemination of news. That interest was rejected by the court. *Id.* at 1308-09.

These decisions are not limited to discriminatory taxation affecting the print media. The Oklahoma Supreme Court recently held that a tax structure which taxed broadcasters but exempted the print media violated the First Amendment. *Oklahoma Broadcasters Ass'n v. Oklahoma Tax Comm'n*, ___ Okla. ___, 789 P.2d 1312 (1990).[21] The Oklahoma court stated

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[21] In *Oklahoma Broadcasters*, three taxation schemes were

that while both *Minneapolis Star* and *Arkansas Writers' Project* found First Amendment violations resulting from differential tax schemes between members of the print media, "there is nothing to suggest that this court should, without sufficient justification, approve preferential treatment of print media over the broadcast media, where both are members of the press. The First Amendment guarantees freedom of the press—not just the *printed* press." *Id.* at 1316 (emphasis in original).

A New York appellate court has also held that treating print media and broadcast media differently by imposing a franchise tax on all advertising income

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challenged: (i) an excise tax on the gross receipts or gross sales of licensing agreements to exhibit motion pictures or to receive images for telecast that did not extend to comparable licensing agreements entered into by newspapers and radio broadcasters; (ii) a sales tax on gross receipts of sales of advertising that contained an exemption for the sale of advertising space in newspapers, periodicals, and billboards; and (iii) a sales tax that applied to purchases of broadcasting equipment but which exempted purchases of equipment used in the production of newspapers. The excise tax on licensing agreements was held to be unconstitutional because the only difference between the licensing agreements of radio broadcasters and newspapers from television broadcasters was the manner in which the material subject to the agreement is finally presented to the licensee. ___ Okla. at ___, 789 P.2d at 1316-17. The sales tax on advertising failed since the sale of the advertising service by broadcasters was taxed, while the sale of the same service by a newspaper was exempt. The court found no merit in the tax commission's argument that the result was permissible because broadcast media has been subject to a higher degree of regulation than print media. *Id.* The tax on broadcasting equipment was also found to be constitutionally infirm. The court rejected the tax commission's distinction that print media produces a tangible product while broadcast media does not. *Id.*

of magazine publishers did not serve a compelling interest and violated the First Amendment. *McGraw-Hill, Inc. v. State Tax Comm'n*, 146 A.D.2d 371, 541 N.Y.S.2d 252 (1989), *aff'd*, 75 N.Y.2d 852 (1990). The court stated that "a taxing scheme which taxes some members of the press but exempts others of the press does not escape 1st Amendment scrutiny even if businesses outside the press are also not exempt." 146 A.D.2d at 375, 541 N.Y.S.2d at 255. The tax commission argued that the unique nature of the electronic media makes it more susceptible to governmental regulations and that there are many differences between the print and visual media. "While that may be true," the court ruled that "such an argument fails to show any compelling State interest in taxing the two types of media differently." *Id.*

C. The Arkansas Sales Tax on Cable Television Is Constitutionally Infirm.

1. Arkansas Has Singled Out Cable Television for Special Tax Treatment.

The Arkansas sales tax suffers from the type of discrimination identified in *Minneapolis Star* because it taxes cable television differently from other communications media. Section 26-52-301 levies an excise tax of three percent on the gross proceeds or gross receipts derived from all sales to any person of cable television services. The tax targets cable television as compared to other communications media because the sales tax does not apply to any other mass media communicator with which cable television directly competes.[22] For example, program distribution via tel-

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[22] As amended by Act 769 of 1989, the tax was made to apply to SMATV.

evision or radio, *i.e.*, the advertising transaction that funds the program distribution, is not covered by the tax. Nor does the tax apply to newspaper sales; sales of advertising space in newspapers and publications and billboard advertising services; and religious, professional, trade, and sports journals and publications printed and published within the State and sold through regular subscriptions.[23]

These preferences for newspapers and subscription magazines make this case analogous to *Oklahoma Broadcasters*; for as in that case there is no justification for "approv[ing] preferential treatment of the print media" over cable. ___ Okla. at ___, 789 P.2d at 1316. The magazine and newspaper exemptions mean that only a few members of the Arkansas communications media pay any sales tax. This type of discrimination poses a particular danger of abuse by the State:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the state imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.

Minneapolis Star, 460 U.S. at 585. Accordingly, as with the discriminatory taxes in *Minneapolis Star* and

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[23] The proceeds of the over-the-counter sale of books and magazines are subject to the tax. As previously noted, the tax has not been amended to exempt all subscription magazines in accordance with the decision in *Arkansas Writers' Project*.

Arkansas Writers' Project, the State must demonstrate that the discriminatory tax on cable meets a heightened level of scrutiny before it passes constitutional muster.[24]

2. Arkansas Has Failed To Meet Its Burden of Demonstrating a Substantial Justification for the Differential Taxation of Cable Television.

Because the differential taxation of cable television under the Arkansas statute imposes acute burdens on rights protected by the First Amendment, the regulation must withstand a high level of constitutional scrutiny. Where a First Amendment violation is alleged, "the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force." *Preferred Communications*, 476 U.S. at 496. Such infringements "cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*

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[24] Petitioner-Respondent Pledger, in his Petition for Certiorari in Docket No. 90-29, asserts that because the Arkansas legislature was unaware of the existence of SMATV, the unconstitutionality of the tax is at least partially ameliorated. Petition for Certiorari at 8-13, *Pledger v. Medlock* (No. 90-29). Evidently, Pledger believes that unconstitutional regulations may validly be enforced as long as the legislature in question is unaware of the consequences of its actions. This position raises the adage "ignorance is bliss" to a unique place in constitutional jurisprudence.

In support, *Pledger* cites only *Katzenbach v. Morgan*, 384 U.S. 641 (1966), arguing it stands for the proposition that "legislative findings of fact" must be given "due respect" in making judicial determinations. Petition for Certiorari in No. 90-29 at 11. The alleged obliviousness of the Arkansas legislature to the existence of SMATV, however, cannot be considered a "finding of fact." It was at best an oversight, and is entitled to no deference.

v. Valeo, 424 U.S. 1, 63 (1976). The interest served must be "paramount, one of vital importance, and the burden is on the government to show [its] existence . . . ." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). In serving the asserted interest, the regulation must be narrowly drawn to avoid imposing unnecessary burdens on the protected First Amendment rights. *Id.* at 363.

Consonant with these principles, the Court in *Minneapolis Star*, following "a long line of precedents," stated that regulations burdening First Amendment rights can survive only if "the governmental interest [served] outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly."[25] 460 U.S. at 585 n.7. Thus, a differential tax scheme which burdens First Amendment rights is invalid unless "the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* at 585.

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[25] The line of cases followed in *Minneapolis Star* illustrates the diversity of First Amendment interests to which this standard applies. The three cases cited specifically by the Court all involved burdens on different First Amendment rights. In *United States v. Lee*, 455 U.S. 252 (1982), the Court applied the standard in assessing the constitutionality of the federal social security tax in light of its burden on the free exercise of religion. *United States v. O'Brien*, 391 U.S. 367 (1968), was concerned with restrictions on "symbolic speech" resulting from a regulation prohibiting the burning of draft cards. Finally, *NAACP v. Alabama*, 357 U.S. 449 (1958), applied the standard in a case involving infringement of the First Amendment freedom of association. These cases make it clear that the standard applied in *Minneapolis Star* controls not only in cases where the rights of the print media are concerned, but in *all* cases involving the infringement of First Amendment rights.

The compelling interest advanced by Arkansas in the present case was articulated by the Arkansas legislature as the need "to provide adequate funding for schools and other essential services required by the citizens" of the state. Act 188 of 1987, § 3. As recognized by this Court in *Minneapolis Star*, the interest of Arkansas in raising revenue for essential services is "critical to any government." 460 U.S. at 586. The Arkansas sales tax, however, fails the test enunciated in *Minneapolis Star* because this interest can be served by means less burdensome to First Amendment rights. A sales tax of general applicability would serve the stated interest while avoiding the First Amendment burden inherent in a tax which singles out cable television for discriminatory treatment.[26] *See Minneapolis Star*, 460 U.S. at 586; *Arkansas Writers' Project*, 481 U.S. at 231-33.

Nor will a lack of improper motive on the part of the State cure the unconstitutionality of the tax. Whether or not the Arkansas legislature intended to

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[26] Respondent Pledger has argued that the challenged tax meets the requirement that regulations burdening First Amendment rights must be narrowly drawn because the tax "goes no further than necessary to advance the 'important or substantial interest' of raising revenue to provide for the education of Arkansas' children and to meet the needs of its citizens." Brief in Opposition to Petition for Certiorari at 5, *Medlock v. Pledger* (No. 90-38). Pledger misapprehends the meaning of the requirement. The question is not whether the State has demanded greater revenues from cable television than it actually needs to fund its schools and other services. The question is whether Arkansas has impermissibly burdened First Amendment rights by singling out cable television to provide the desired monies. The answer, as explained in both *Minneapolis Star* and *Arkansas Writers' Project*, is yes.

discriminate against cable operators is irrelevant. As stated in *Minneapolis Star*, the motives of the legislature need not be impugned since "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." 460 U.S. at 592 (citations omitted). The Arkansas sales tax is not narrowly drawn to achieve the stated government interest. It, therefore, must be struck down as unconstitutional.

CONCLUSION

The judgment of the Arkansas Supreme Court holding unlawful the sales tax placed on cable television services by Act 188 of 1987 should be affirmed. To the extent the Arkansas Supreme Court ruled that the tax placed on cable television services as amended by Act 769 of 1989 was lawful, such ruling should be reversed.

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October Term, 1990

JAMES C. PLEDGER, COMMISSIONER
OF REVENUES OF ARKANSAS,

Petitioner,

v.

DANIEL L. MEDLOCK, ET AL.,

Respondents.

No. 90-29

[Caption In No. 90-38 On Inside Cover]

On Certiorari To The Arkansas Supreme Court

BRIEF AMICI CURIAE OF THE COMPETITIVE CABLE ASSOCIATION AND THE MEDIA INSTITUTE IN SUPPORT OF RESPONDENTS IN NO. 90-29 AND PETITIONERS IN NO. 90-38

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Respondents.

CITY OF FAYETTEVILLE, ARKANSAS,

Intervenor.

No. 90-38

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INTEREST OF AMICI

The Competitive Cable Association is a non-profit association whose members are committed to establishing and supporting First Amendment rights for the operators of cable television and other video distribution systems. The Association is opposed to unreasonable limits upon or barriers to the entry of multichannel video providers, and stands for the right to compete in the supply of such video services. In connection with its professed goals, the Association holds seminars, participates in proceedings before the Federal Communications Commission and other federal agencies, publishes materials, testifies before congressional and other legislative bodies, and participates in select court cases.

The Media Institute is an independent, non-profit, tax exempt research organization supported by a wide range of foundations, corporations, associations, and individuals. In 1987, the Institute created the First Amendment Center For The New Media to study speech rights connected with the development of new information services. Through its First Amendment Center, the Institute participates in select cases, conducts research projects, and sponsors publications relating to the generation, distribution, and receipt of electronically transmitted information. The right to engage in these three activities is integrally related to the Institute's research activities.

Both *Amici* believe that the emerging electronic members of the media, such as cable television, are entitled to full First Amendment protection from governmental

restraint, and that the continuing vitality of our democratic process depends, in part, upon our ability to continue the balance struck between government and the mass media as electronic communication overtakes print as the dominant form of mass media in our society. *Amici* support the position that the First Amendment to the United States Constitution precludes the imposition of taxes upon cable television services where the imposition discriminates between forms of the media without compelling justification.

Amici also believe that this case is not an appropriate vehicle for consideration by the Court of the broader issues relating to appropriate governmental regulatory responses (if any) to specific perceived differences in the method of delivery of speech between various members of the mass media. *Amici* wish to urge the Court that care be taken not to appear to address issues of regulation, as opposed to taxation, of cable television the resolution of which should await a more fully developed and better focused factual record.

SUMMARY OF ARGUMENT

1. This Court's decisions which interpret the First Amendment to preclude differential taxation of the press, absent a showing that the government interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly, should be equally applied to taxation which discriminates between different forms of the mass media. The conclusion of the court below that different forms of media can

be taxed differently so long as they do not deliver "substantially the same service" should be rejected as lacking a logical connection to the governmental purpose to be achieved – the raising of revenue.

A blending of the technological differences between various forms of mass media is occurring and will continue to occur, and the emerging forms of electronic media, such as cable television, should not be relegated to a lesser status under the First Amendment. Cable television has a unique potential to participate in the democratic process through journalistic coverage of and comment upon local governmental activities. This potential makes cable television an important member of the media, as well as rendering it vulnerable to taxation for retaliatory or censorial reasons.

2. Because of the lack of a fully developed factual record as well as a lack of adversity, the Court should not resolve issues relating to the appropriate regulatory responses of local government to particular perceived attributes of cable television or other multi-channel video providers, outside of the taxation area. There are serious and substantial questions about several "facts" contained in the Arkansas Supreme Court decision, which should not be adopted by this Court without careful legal and factual examination. The Court should await a later case to address these issues, and should explain in its decision that it does not reach them in this case.

ARGUMENT

I. DISCRIMINATORY TAXATION AMONG THE MEDIA SHOULD NOT BE PERMITTED ABSENT COMPELLING JUSTIFICATION; EMERGING ELECTRONIC FORMS OF THE MEDIA SHOULD NOT BE RELEGATED TO SECOND CLASS STATUS

Past decisions of the Court make clear that the government may not differentially tax members of the press absent a compelling justification for the differing treatment. *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 421 (1987) (hereinafter *"Ragland"*); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (hereinafter *"Minneapolis Star"*). The government's general interest in raising revenue, while compelling, will not suffice to save a differential tax scheme in this context. Rather, such a taxing scheme is consistent with First Amendment principles only if "the government interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly." *Minneapolis Star, supra*, 460 U.S. at 586 n.7.

Two related constitutional questions appear to be raised by this case: (1) "When taxing the electronic media, can the First Amendment guarantees set forth in *Minneapolis Star* and *Ragland* be avoided merely by the assertion of differences between members of the media, where those differences are unrelated to the governmental purpose of the taxation?" (2) "Is differential taxation of different forms of the mass media subject only to the minimal judicial scrutiny which is applied where fundamental interests are not implicated?" *See, Kahn v. Shevin*, 416 U.S. 351, 355 (1974); *Allied Stores v. Bowers*, 358 U.S.

522 (1959). *Amici* believe the answer to both questions should be in the negative. *Amici* believe that the purposes of the First Amendment require that government be held to the same standards for differential taxation between the media as among the same medium.

The court below, in effect, "split the baby." It rejected the trial court's contention that cable television's presumed "use of public rights-of-way" justified different tax treatment for cable television than for other media,[1] since the governmental interest asserted (raising revenue) was unrelated to the perceived difference.[2] However, the court also decided that the type of dissemination provided through print and by cable television could be characterized differently, and concluded that differential taxation is permissible under the First Amendment, as long as the differentially taxed media do not deliver "substantially the same service". The court below ruled that cable television and satellite television provide "the same service", but impliedly found that cable television and the print media do not.[3] The decision does not indicate whether the court believed that any difference it perceived in the services offered by print and cable television was related to the governmental interest in raising revenue, or whether the court merely deferred to a legislative judgment on that question.

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[1] *See,* Petition for Certiorari in No. 90-29 at C-10.

[2] *Id.* at A-3.

[3] *Id.* at A-5 – A-6.

Amici believe that the court below erred in failing to focus upon the question of linkage between the "difference" it found between the services offered by print and cable television and the interest in raising revenue sought to be served by the taxes imposed. *Amici* also believe that the court erred if it deferred to legislative judgments in this context. Finally, the court appeared to uphold discriminatory taxation based upon criteria intertwined with content, contrary to this Court's holding in *Ragland, supra*. If this Court affirms the analysis of the Court below, the First Amendment concerns raised in *Minneapolis Star, Ragland* and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), will provide only limited protection against taxes upon the emerging electronic media, and as a practical matter, will likely relegate those forms of media to a "second class" status, subject to far more taxation than is the print medium.

The ultimate question is whether traditional First Amendment freedoms are to be recognized when most communication, including that of the traditional press, is already – or will soon be – produced, transmitted and received electronically. In the words of one commentator:

> The issue of the handling of the electronic media is the salient free speech problem for this decade. . . . [¶] . . . The onus is on us to determine whether free societies in the twenty-first century will conduct electronic communication under the conditions of freedom established for the domain of print through centuries of struggle, or whether that great achievement will become lost in a confusion about new technologies.

Pool, *Technologies of Freedom* 10 (1983). Mark S. Fowler, former Chairman of the Federal Communications Commission, has noted that the "functional differences [between newspapers and cable television] are merging into one and the same technology" and that "[i]t cannot be acceptable . . . that the protections created by the First Amendment should dwindle and the balance struck between government and the free press should be undone, whether by direct or indirect means." Cable Television Regulation, Part 2: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp., 97th Cong., 2d Sess. 203-04 (1982).

While this Court has often noted that specific differences in method of communication may justify different governmental responses (*Southwestern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 [1975]), the Court has required a particularized factual showing that the differential treatment was properly tailored to a specific and peculiar problem presented by the conduct connected to the form of communication at issue:

> Only if we were to conclude that live drama is unprotected by the First Amendment – or subject to a totally different standard from that applied to other forms of expression – could we possibly find no prior restraint here. Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952); see, Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969). By its nature, theater usually is the acting out – or singing out – of the written word, and frequently mixes

> speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard. For, as was said in Burstyn, supra, at 503, when the Court was faced with the question of what First Amendment standard applies to films:
>
> "[T]he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule."

Id. Amici submit that the "basic principles of freedom of speech and the press" do not "vary" between emerging electronic media, such as cable television, and the more traditional print media. Having made the decision to exempt the print media from the taxation at issue, a compelling showing should be required of the State of Arkansas to justify different treatment of cable television.

Cable television is the medium of mass communication most suitable for coverage of local governmental activities, and journalistic comment upon such activities. Unlike the broadcast medium, cable television can be effectively "narrow-casted" to residents within the boundaries of a particular local governmental unit, thus permitting political coverage and commentary to be directed only to those most likely to have an interest in receiving it. Unlike the print medium, cable television permits video coverage (either live or tape-delayed) of local governmental activities, televised interviews, and "call-in shows" or similar opportunities for public participation.

This potential for cable television to play a role in the democratic process[4] – particularly at the local level – engenders precisely the same free speech concerns which require invalidation of special taxes upon newspapers, and makes the need for First Amendment protection from the threat or reality of retaliatory governmental taxation as important for cable television as for the printed press. *See, Grosjean, supra,* at 245-50.

II. THE COURT SHOULD NOT ASSUME THE ACCURACY OF THE ARKANSAS COURTS' DISCUSSION OF CABLE TELEVISION'S "USE" OF PUBLIC PROPERTY OR THE "NEED FOR A FRANCHISE"

Amici's unique perspective in this case is its particular interest in promoting the ability of multi-channel video providers, including cable television, to compete with each other. The taxation issue before the Court is an important one in this regard, since the imposition of taxes such as the one at issue here can have a deleterious effect upon the economic viability of fledgling competition in this area.[5] The taxation issue appears fully presented and

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[4] *See, New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964); *Mills v. Alabama,* 384 U.S. 214, 219 (1966).

[5] Though Legislative motive is not a necessary inquiry in the taxation context (*Minneapolis Star, supra,* 460 U.S. at 592-93), the Court should be aware of the potential for differential taxation among the media to be utilized as a means of preventing viable competition between cable television companies or other multi-channel video providers. The Federal Communications Commission earlier this year noted the prevalent tendency of local governments to utilize both direct and indirect

(Continued on following page)

ripe for decision. However, *Amici* are concerned that the Court might accept as true certain factual or legal premises espoused by the court below which, if reflected in a decision by this Court, could have an unintended effect upon consideration by the lower courts of the First Amendment issues raised by governmental regulation of

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(Continued from previous page)

means to impede such competition. *See*, Federal Communications Commission, Report No. 90-276 ("In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision Of Cable Television Service"), July 31, 1990 at ¶¶131-142.

> 138 . . . While exclusive franchising is not the only impediment to the growth of second competitive systems, it is clear that the number of competitive systems would grow at a more rapid pace if local franchise authorities were unable to discourage or forbid such systems. . . .
>
> * * *
>
> 141. We recommend that Congress amend the Cable Act to forbid local franchise authorities from unreasonably denying a franchise to applicants that are ready and able to provide service. Congress should also make it clear that local authorities may not pass rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multi-channel video providers. Franchise requirements should be limited to appropriate governmental interests, such as establishing requirements concerning public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond.

Id., ¶¶138, 141 (fn. omitted). *See also, Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322, 1328 (E.D. Cal. 1987).

cable television (outside of the taxation context), particularly regulation at the local level through the issuance of "franchises". *See, City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 490 n.1 (1986).

The Court below asserted that "cable television uses public property and must obtain a franchise to do so," and that "a cable television enterprise pays a franchise fee for the use of the rights-of-way."[6] The "facts" embraced in the quoted portion of the Arkansas court's decision are, in *Amici's* view, incorrect as a general matter, and should not be accepted without careful examination.[7] *Amici* urge the Court to await a case with a more fully developed factual record on these issues before addressing them.[8]

Cable television companies generally string their wires upon existing public utility facilities, located in public utility easements which have long been dedicated to the provision of public utility services. The provision of "pole attachment services" by public utilities to cable television companies is defined by federal and some state laws as constituting a "public utility service." 47 U.S.C.

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[6] Petition for Certiorari in No. 90-29 at A-3.

[7] *Amici* have no intimate knowledge of the particular circumstances surrounding cable television in Pulaski County, Arkansas. However, because the Arkansas court spoke generally, *Amici* are concerned with the possibility that such generalities might be adopted by this Court without comment.

[8] In *City of Los Angeles v. Preferred Communications, supra*, the Court specifically noted its desire to obtain a fully developed record about "the present uses of the public utility poles and rights-of-way and how Respondent proposes to install and maintain its facilities on them." 476 U.S. at 495.

§224. *See, e.g.*, Cal. Pub. Util. Code §767.5. Since many public utility easements are acquired directly from private land owners, there is doubt as to the extent of the property interest held by local governments in these rights-of-way, at least in some circumstances. *See, Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559, 1563-68 (N.D. Cal. 1988); *County of Sacramento v. Pacific Gas & Electric Co.*, 193 Cal.App.3d 300, 238 Cal.Rptr. 305 (1987).

Moreover, to the extent that the word "franchise" is understood to refer to a "special privilege conferred by government on individual or corporation, and which does not belong to citizens of country generally of common right" (Black's Law Dictionary [5th ed.] at 592 [1979]),[9] *Amici* believe that the same is inconsistent with the exercise of free speech activities. *Amici* do not believe that the First Amendment permits governmental selection of particular persons to engage in the "privilege" of conducting free speech activities, as opposed to the setting forth of uniform requirements designed to meet legitimate health and safety needs. *See, Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1409 (9th Cir. 1985), *aff'd.*, 476 U.S. 488 (1986).

Finally, if and to the extent that cable television does utilize public property, substantial questions are raised as to the extent of authority for imposition of a "franchise fee" or other payment in exchange for that use. *Compare, Century Federal, supra, with Group W. Cable, Inc. v. City of*

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[9] *See also, California v. Central Pacific Railway Co.*, 127 U.S. 1, 40 (1888); *Copt-Air v. City of San Diego*, 15 Cal.App.3d 984, 987, 988-89 (1971).

Santa Cruz, 679 F. Supp. 977 (N.D. Cal. 1988) and *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D.Pa. 1987), *aff'd. on other grounds*, 853 F.2d 1084 (3rd Cir. 1988).

These are difficult issues which merit consideration upon a more fully developed factual record than is presented to the Court in the instant case. This is particularly true where, as here, the parties before the Court had no incentive below to represent the interests of affected third parties – those persons interested in competing in local cable television markets on a competitive basis. The "franchise system" of regulating cable television has been commonly utilized to preclude entry of competition.[10] The incumbent cable television operators, having already obtained such franchises, understandably are not eager to challenge the circumstances which make competition with them unlikely. Obviously, the local governmental bodies which now control the "franchising process" have no incentive to challenge it. Thus, while the parties before the Court are appropriately adverse to litigate the taxation issue, the Court should await another case before adjudicating (explicitly or implicitly) the underlying questions regarding the manner and extent to which cable television typically utilizes public property and the appropriate regulatory responses to that use.

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[10] *See*, n. 5, *supra*.

CONCLUSION

For the reasons stated above, that portion of the decision of the Arkansas Supreme Court raised by the petition in Docket No. 90-38 should be reversed, and that portion raised by the petition in Docket No. 90-29 should be affirmed. However, this Court's decision should not reach – and should explain that it does not reach – the underlying questions as to appropriate regulatory responses of local government to the particular attributes of cable television or other multi-channel video providers, outside of the taxation area.

Respectfully submitted,

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

(13)

Docket No. 90-38

In The

Supreme Court of the United States

OCTOBER TERM 1990

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS,
Petitioners,

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; AND ALL OTHER SIMILARLY SITUATED COUNTIES AND CITIES,
Respondents,

CITY OF FAYETTEVILLE, ARKANSAS,
Intervenor.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF INDIANA CABLE TELEVISION ASSOCIATION INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Indiana Cable Television Association Inc. ("ICTA") is a not-for-profit trade organization composed of approximately 87 cable operators providing cable television services within the State of Indiana. Like their counterparts comprising the Petitioner, Arkansas Cable Television Association, Inc., Indiana cable operators are subject to a discriminatory state excise tax structure (as well as a discriminatory gross income tax scheme).

Such discriminatory tax structures have been implemented with increasing frequency across the nation as state and local governments, especially in light of cutbacks in federal spending, attempt to impose additional taxes upon the rapidly multiplying pool of cable television revenues. In 1976, revenue garnered by cable systems totalled $976 million. By 1989, that amount had skyrocketed to almost $16 billion[1]. Consequently, a single additional excise tax on cable services can produce a huge windfall of tax revenue for states and municipalities with little adverse political fallout from constituents.

The Indiana taxing scheme imposes two forms of discriminatory taxation against cable operators. The Indiana Gross Retail Tax Act[2] imposes an excise tax on all sales of cable television services within the State of Indiana at a rate of 5% while the advertising sales of radio and television broadcasters, being the principal revenue source for the broadcast media, are not deemed to constitute retail sales. Furthermore, newspapers, although involved in the retail transfer of tangible personal property, are specifically exempted from sales tax. The Indiana Gross Income Tax Act[3] subjects Indiana cable operators to a gross income tax of 1.2% of revenues, while radio and television broadcasters, newspapers and other communications media such as display advertising are subjected to a rate of only 0.3%. The combined effect of this discriminatory Indiana state tax treatment is to tax cable operators at a cumulative rate of 6.2% of gross receipts while revenues of radio and television broadcasters and newspapers are taxed at only 0.3% of gross receipts.

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[1] NATIONAL CABLE TELEVISION ASSOCIATION, CABLE TELEVISION DEVELOPMENTS, October 1990, at 8-A.

[2] IND. CODE ANN. §§ 6-2.5-1-1 to 6-2.5-10-4 (West 1990) (relevant excerpts of the Indiana Gross Retail Tax Act are contained in Appendix Exhibit 1).

[3] IND. CODE ANN. §§ 6-2.1-1-1 to 6-2.1-8-10 (West 1990) (relevant excerpts of the Indiana Gross Income Tax Act are contained in Appendix Exhibit 2).

By singling out cable television operators from other similarly situated First Amendment publishers, discriminatory state tax structures not only impose a greater burden on cable operators, but in fact serve to suppress the delivery of ideas, symbolic speech, news, depiction of government activities, forms of entertainment and other means of expression and information commonly disseminated through cable television. There is no compelling state interest to support taxing cable system operators while not taxing other First Amendment publishers such as radio and television broadcasters and newspapers disseminating the same or substantially the same information. **To do so is to suppress speech merely because of the medium employed.**

Because the Indiana tax structure discriminates against cable operators vis-à-vis other similarly situated First Amendment publishers such as radio and television broadcasters and newspapers, Amicus is interested in and supports Petitioners. The constitutionality of Arkansas' tax structure which similarly singles out and discriminates against cable operators will have a significant precedential effect on the rights of cable operators in Indiana.[4]

[4] Indeed, many other states impose a discriminatory excise and/or income tax on cable operators. *See, e.g.*, Mich. Comp. Laws §§ 205.51 - .78, .91 - .111 (1990) (Michigan General Sales Tax and Michigan Use Tax Act specifically exempt radio and television broadcasters, but not cable operators).

ARGUMENT

A. CABLE OPERATORS ARE ENTITLED TO FIRST AMENDMENT PROTECTION.

Like other communications media, this Court has repeatedly held that First Amendment protections extend to cable television.[5] Most recently, this Court affirmed in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), that cable television enjoys First Amendment rights, noting that:

> We do think that the activities in which [Preferred] allegedly seeks to engage plainly implicate First Amendment interests. . . . Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [Preferred] seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." . . . Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers and pamphleteers.

Id. at 494 (citation omitted).

This conclusion by the Court is consistent with numerous other decisions of the Court which extend First Amendment protections to various types of speech and conduct regardless of the medium employed. *See, e.g., Texas v. Johnson*, 341 U.S. _____; 105 L.Ed.2d 342 (1989) (flag burning); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (nude dancing); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976) (movies); *Schacht v. United States*, 398 U.S. 58 (1970) (theater); *Butler v. Michigan*, 352 U.S. 380 (1957) (books); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (newspapers and magazines). The First Amendment rights of cable operators are of no less significance than the

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[5] *See, e.g., Federal Communications Commission v. Midwest Video Corp.*, 440 U.S. 689 (1979).

rights of other First Amendment publishers merely because the medium employed to disseminate information is coaxial or fiber optic cable.

B. DISCRIMINATORY TAXATION AMONG FIRST AMENDMENT PUBLISHERS IS PROHIBITED.

For tax purposes, cable television operators are similarly situated with other First Amendment "publishers" — newspapers, broadcasters, wireless television and radio operators. Arkansas, like Indiana, taxes cable operators at a higher rate than it taxes other "publishers." Such discriminatory taxation must be justified by a compelling state interest. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). In this case, Arkansas has no compelling state interest. Therefore, its discriminatory tax is unconstitutional. [6]

1. The Relevant Class in which Disparate Treatment is Analyzed is "Publishers" which Includes Newspapers, Magazines, Television Broadcasters, Radio Broadcasters, Cable Television Operators and Other Providers of Video Programming Services.

Similarly situated First Amendment publishers cannot be taxed in a discriminatory fashion. *Minneapolis Star* at 585. This Court has struck down disparate state tax schemes involving publishers using the identical media. *See, e.g., Minneapolis Star* (newspapers v. newspapers) and *Arkansas Writers' Project* (magazines v. magazines).

Earlier this year, three state courts analyzed Arkansas-like discriminatory tax schemes involving different media and held such discrimination violates the publishers' First Amendment rights. The state courts' rationale is persuasive.

In *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. 1990), the

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[6] Respondents deny cable operators are First Amendment "press," because cable operators do not use newsprint or wireless broadcasts, despite the fact that each medium transmits often identical messages and information. *See Respondents' Brief in Opposition to Petition for Writ of Certiorari*, Case No. 90-38 at 4, 10. Thus, Respondents claim they need show only a rational basis for their discrimination. Even if the rational basis test is applied, Petitioner prevails. *See, infra*, at § B(3).

Tennessee Supreme Court struck down the Tennessee sales tax scheme which exempted mail order sales of subscriptions to newspapers from sales tax but taxed mail order sales of magazine subscriptions. The Tennessee court made two important determinations in applying this Court's *Minneapolis Star* holding. First, it held that even if a tax is of general applicability, such as a sales tax, the state must still show a compelling state interest if such a tax either singles out press or targets individual publications within the press. Second, in defining the class of publishers among which discriminatory taxation was to be evaluated, the court included two different media (magazines and newspapers).

In *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 P. 2d 1312 (Okla. 1990), the Oklahoma Supreme Court went one step further and compared discriminatory taxation between broadcasters and the newsprint media. The court struck down a state sales tax scheme which imposed sales tax on the sale of advertising by television and radio broadcasters, but exempted from sales tax such sales by newspapers and magazines. In reaching its holding, the court determined that "radio, television and print media were all the same trade or profession, i.e. 'publishing' industry." *Id.* at 1315. Since both broadcasters and members of the print media were held to be members of the "press," the court found that the "First Amendment guarantees freedom of the press — not just the *printed* press." *Id.* at 1316.

Like the *Newsweek* court, the Oklahoma court applied *Arkansas Writers' Project* which prohibits a state from imposing a tax that either singles out the press or targets some but not all publishers or publications, absent a compelling reason for differential treatment. Additionally, the court dismissed the state's contention that broadcasters were subject to greater regulation because of the scarcity of the electromagnetic broadcast spectrum. The court held that the existence of technological scarcity of the airwaves has absolutely no connection with the ability of a state to tax the activities of broadcasters:

> Appellant Tax Commission's argument in response to the trial court's ruling is that this result is permissible because the broadcasting media has been subject to a higher degree of regulation than printed materials. We find no merit to this argument. The cases cited to by Appellant Tax Commission

> deal with *regulation* of the broadcast industry in that broadcast wavelengths represent a limited resource .... No analogy can be drawn to the present challenge.

Id. at 1317 (citations omitted).

In determining that discriminatory taxation of members of the press violated the First Amendment and Fourteenth Amendment equal protection rights of broadcasters, the Oklahoma Supreme Court found it unnecessary to define the extent of the First Amendment protections of broadcasters or their relative position vis-à-vis the First Amendment rights of the printed press.

In *Suburban Cable TV Co., Inc. v. Commonwealth of Pennsylvania*, 131 Pa. Commw. 368; 570 A.2d 601 (1990), the Commonwealth Court of Pennsylvania struck down the imposition of a Pennsylvania capital stock tax on cable television operators where publishers of books, newspapers, magazines or other periodicals and broadcasters of radio and television programs were exempt. The court recognized that the publishing industry included cable television operators, broadcasters and the print media. Furthermore, when comparing cable television operators and broadcasters, the court held that there was no rational relationship between the identity of the authorizing government (federal for broadcasters and municipal for cable operators) upon which disparate tax treatment could be premised. According to the *Suburban Cable TV* court:

> Why should information-transmitting media be encouraged and fostered by tax exemption when the governmental authority for this existence is a federal agency; while other information-transmitting media, disseminating the same sources of information and more besides, are denied exemption because the authorizing government is primarily local government and only incidentally federal government?

Id. at 386.

As these state courts have determined, for purposes of First Amendment taxation analysis, the relevant class is "publishers." All

members of the print and electronic media are publishers. Just as newspapers or magazines originate material (write original articles), edit material (select which articles to publish from original or other sources) and publish material, so do cable operators and broadcasters. Cable operators provide some original programming, edit (determine which programs to carry from a wide variety of program suppliers) and publish (sending of the signal over the cable distribution system). *See Midwest Video.* Since the appropriate class is publishers, when this Court analyzes the validity of the Arkansas taxing scheme on First Amendment grounds, the relevant analysis is the taxation of cable operators compared to broadcasters, newspapers and magazines.

2. Discriminatory Taxation Among First Amendment Speakers Can Only be Justified by a Compelling Governmental Interest.

First Amendment rights are by no means unlimited. This Court has long held that government can impose reasonable regulations on those persons exercising First Amendment rights. However, once a law has the effect of treating press providers differently, the Court must strictly scrutinize the law. As this Court noted in *Minneapolis Star:*

> Further, differential treatment, unless justified by some special characteristics of the press, suggests the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.

460 U.S. at 585.

To overcome the presumption of invalidity, a state tax regulation that discriminates among the press must advance a *compelling* governmental interest:

> Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of a *compelling importance*, that it cannot achieve without differential taxation.

Id. at 585 (emphasis added).

In *Minneapolis Star*, this Court struck down a state use tax as violative of the First Amendment because it discriminated among members of the printed press. The heavy burden that a state must meet to survive this Court's strict scrutiny of a discriminatory governmental tax or regulation cannot be over emphasized:

> A tax that singles out the press, or that targets individual publications within the press places a heavy burden on the state to justify its action.

460 U.S. at 592-593.

Four years after *Minneapolis Star*, this Court in *Arkansas Writers' Project* reiterated the heightened scrutiny that must be applied when a government regulation discriminates among members of the "press:"

> Arkansas faces a heavy burden in attempting to defend the content based approach to taxation. In order to justify such differential taxation, the State must show its regulation is *necessary* to serve a *compelling* state interest and is narrowly drawn to achieve that end.

481 U.S. at 231 (emphasis added).

When held up to the strict scrutiny standard of review enunciated by this Court in *Minneapolis Star* and *Arkansas Writers' Project*, courts that have reviewed state tax schemes that discriminate among members of the press have held that the states failed to show a compelling governmental interest to warrant the discriminatory treatment. *See Oklahoma Broadcasters* (no compelling reason found for imposing differential tax burden on print media and broadcast media); *Newsweek*, (no compelling state interest furthered by imposing differential tax on mail order sales of newspaper subscriptions and mail order sales of magazine subscriptions); *Satellink of Chicago, Inc. v. City of Chicago*, 168 Ill. App. 3d 689, 523 N.E.2d 13 (1988) (city could not show a compelling state interest to justify imposing an amusement tax on subscription television but not franchised cable television). The First Amendment rights of cable operators encompass both the protections of freedom of speech and freedom of

press. *See, e.g., City of Alameda v. Premier Communications Network, Inc.*, 156 Cal. App. 3d 148; 202 Cal. Rpts. 684 (1984), *cert. denied*, 496 U.S. 1073 (1984) (a subscription television service which provided the Home Box Office service was a disseminator of motion pictures, news, and other information and entertainment programming, and therefore was entitled to guarantees of freedom of speech and press).

3. The Arkansas Tax Discriminates Against Cable Television Operators.

The Arkansas taxing scheme subjects the subscriber revenues of cable operators to a 3% tax on gross receipts. *See* ARK. STAT. ANN., § 26-52-301(3)(D)(i) (1990). The 3% tax is not imposed on either the revenue stream created by advertising of broadcasters, newspapers or magazines, nor upon that created by the sale of newspapers. *See* ARK. STAT. ANN., §§ 26-52-401(5), (14) (1990).

The Arkansas tax singles out one element of the "press" i.e., cable television companies, including satellite transmission operators, for the payment of taxes that no other enterprise engaged in the dissemination of opinion, ideas or entertainment is required to pay.

There is little discernable difference to the viewer of a broadcast television program and a cable television program. Indeed, much cable television programming is broadcast television.

There is no principled or reasoned distinction between cable operators, including satellite operators, and other journalists that justifies taxing cable operators at a discriminatory rate. The fact that many cable operators use public rights-of-way is no justification at all and the Arkansas Supreme Court properly rejected the Respondents' claim in this action that its discriminatory tax should be upheld because some cable operators used public rights-of-way. See *Medlock v. Pledger*, 301 Ark. 483; 785 S.W.2d 202 (1990). The Arkansas tax applies equally to cable television operators using public rights of way and satellite operators who use no rights-of-way at all. Indeed, the Arkansas court's decision regarding the validity of the tax was expressly conditioned upon the inclusion of satellite operators within the taxing scheme.

The State of Arkansas has simply not produced a compelling state

interest to justify the discriminatory taxation of cable operators vis-à-vis broadcasters or newspapers.

Even if the challenged statute is subject to rational basis analysis, it fails the test. Under the rational basis standard, entirely exempting newspapers, radio, wireless television, and magazines from taxes which are imposed on cable operators must rationally further a reasonable purpose identified by the state. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Respondents argue discriminatory taxation is rationally related to some state interest in "use of public ways" and "public order:"

> The same facts which render cable television completely dissimilar to all other media provide more than sufficient support for subjecting sales of cable television service to the general sales tax. Cable's use of public ways and disruption of public order place it in a different class for both First Amendment and equal protection considerations.

Respondents' Brief in Opposition to Petition for Writ of Certiorari, Case No. 90-38 at 10.

Respondents' claims are unavailing. In fact, the Arkansas Supreme Court held that Respondents' asserted interest has no rational connection to discriminatory taxation:

> In his order ruling against the taxpayers, the chancellor distinguished the cable medium from others on the ground that it required use of a public right of way in addition to the fact that there are no gross proceeds to be taxed in the case of, for example, broadcast television. There was uncontradicted testimony to the effect that a cable television enterprise pays a franchise fee for the use of the right of way. It is true that the use of public rights of way by cable television may subject it to more regulation as has been suggested in some cases. . . . However, those cases involve regulation related to access to or use of the rights of way rather than a tax which has no relationship to the acquisition of the privilege of using public

> property. We thus find the fact that cable television uses public property and must obtain a franchise to do so should not control the result in this case.

Medlock, 785 S.W.2d at 203 (citation omitted).

Even assuming Respondents' assertion that "cable's use of public ways and disruption of public order place it in a different class," Respondents must show some rational basis for the discrimination. This, they cannot do.

SUMMARY OF ARGUMENT

Cable operators are First Amendment speakers and are similarly situated with radio and television broadcasters, newspapers and magazines. All members of the print, electronic and cable television media engage in the common activities of originating speech, editing speech and publishing speech. Hence they are all "publishers."

To be valid, a state taxing scheme may not impose disparate burdens among similarly situated First Amendment speakers absent a compelling state interest. Consequently, a tax such as the Arkansas tax, which burdens cable operators to a greater extent than other publishers without the existence of a compelling state interest, is violative of the First Amendment protections of cable operators and must be struck down by this Court.

CONCLUSION

Like newspapers, broadcast television, and other members of the publishing press, cable operators have First Amendment protection.

The First Amendment stands as a guard against government taxation which is applied differently to otherwise similarly situated publishers based solely on the medium by which information is disseminated.

As are broadcasters and members of the print media, cable operators are First Amendment publishers. **Whether or not the First Amendment rights of cable operators are comparable to those of the print media or broadcast media need not be resolved by the Court in this case.** A state tax that discriminates in its treatment among First Amendment

publishers must be evaluated under this Court's strict scrutiny standard of review. The imposition of a discriminatory tax that treats cable operators differently than other First Amendment publishers can only be justified if the state demonstrates a compelling governmental interest.

Under the Arkansas tax scheme, how a First Amendment publisher disseminates information -- the medium employed -- is the sole factor for determining the publisher's tax liability. Cable operators and other providers of video and audio programming services are singled out for a special 3% tax merely because these publishers receive their revenue directly from subscribers. Broadcasters, newspapers, and magazines are not subjected to the same 3% tax. No compelling governmental interest can be or has been asserted by Arkansas for this discriminatory tax treatment. Furthermore, the discriminatory tax statute is not even rationally related to a legitimate governmental interest.

The State of Arkansas Act 188 of 1987, as amended by Act 769 of 1989, violates the First Amendment rights of cable operators. Therefore, the judgment of the Arkansas Supreme Court should be reversed by this Court.

Respectfully submitted,

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November 15, 1990

APPENDIX TO AMICUS CURIAE BRIEF OF INDIANA CABLE TELEVISION ASSOCIATION INC.

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Exhibit 1 – Excerpts of the Indiana Gross Income Tax Act

ARTICLE 2.5
STATE GROSS RETAIL AND USE TAXES

6-2.5-1-2 "Retail transaction" and "retail unitary transaction"

Sec. 2. (a) "Retail transaction" means a transaction of a retail merchant that constitutes selling at retail as described in IC 6-2.5-4-1, that constitutes making a wholesale sale as described in IC 6-2.5-4-2, or that is described in any other section of IC 6-2.5-4 . . . .

6-2.5-1-5 "Gross retail income"

Sec. 5. (a) "Gross retail income" means the total gross receipts, of any kind of character, received in a retail transaction, except that part of the gross receipts attributable to:

(1) the value of any tangible personal property received in a like kind exchange in the retail transaction; or

(2) the receipts received in a retail transaction which constitute interest, finance charges, or insurance premiums on either a promissory note or an installment sales contract . . . .

6-2.5-1-8 "Retail merchant"

Sec. 8 "Retail merchant" means a person who is described as a retail merchant in IC 6-2.5-4 or who is required to hold a retail merchant's certificate under IC 6-2.5-8.

6-2.5-2-1 Imposition; liability; payment; collection

Sec. 1. (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana . . . .

6-2.5-4-1 Selling at retail

Sec. 1. (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.

(b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

(1) acquires tangible personal property for the purpose of resale; and

(2) transfers that property to another person for consideration . . . .

6-2.5-4-11 Cable television service

Sec. 11. (a) A person is a retail merchant making a retail transaction when he furnishes local cable television service or intrastate cable television service.

(b) Notwithstanding subsection (a), a person is not a retail merchant making a retail transaction when the person provides, installs, constructs, services, or removes tangible personal property which is used in connection with the furnishing of local cable television service or instrastate cable television service.

6-2.5-5-17 Newspapers

Sec. 17. Sales of newspapers are exempt from the state gross retail tax.

Exhibit 2 – Excerpts of the Indiana Gross Income Tax Act

ARTICLE 2.1
GROSS INCOME TAX

6-2.1-1-2 "Gross income"; inclusions; exclusions; "exchange"; "like kind"

Sec. 2. (a) Except as expressly provided in this article, "gross income" means all the gross receipts a taxpayer receives;

(1) from trades, businesses, or commerce; . . .

6-2.1-1-12 "Retail merchant"

Sec. 12. "Retail merchant" means a taxpayer who is regularly and occupationally engaged in the business of purchasing tangible personal property and providing the tangible personal property to his customers at a fixed and established place of business. For purposes of this section, the property may be sold as purchased, after modification, or in conjunction with the rendition of personal services.

6-2.1-2-1 Definitions

Sec. 1. As used in this chapter: . . .

(b)(1) "Selling at retail" means a transaction in which a retail merchant in the ordinary course of his regularly conducted business transfers the ownership of tangible personal property to another, conditionally or otherwise, for a consideration if:

(A) the retail merchant had previously acquired that tangible personal property for the purpose of reselling it; and

(B) the transferee acquiring the property does not acquire the tangible personal property for the purpose of making a wholesale sale. . . .

6-2.1-2-2 Gross income tax imposed; determination of tax rate

Sec. 2. (a) An income tax, known as the gross income tax, is imposed upon the receipt of:

(1) the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana; and

(2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

6-2.1-2-3 Rates of tax

Sec. 3. (a) The receipt of gross income from transactions described in section 4 of this chapter is subject to a tax rate of three-tenths of one percent (0.3%).

(b) The receipt of gross income from transactions described in section 5 of this chapter is subject to a tax rate of one and two-tenths percent (1.2%).

6-2.1-2-4 Rate of tax; income derived from certain business transactions

Sec. 4. The receipt of gross income from the following is subject to the rate of tax prescribed in section 3(a) of this chapter:

(1) wholesale sales;

(2) *display advertising, including outdoor painted and poster display advertising and radio and television media advertising,* but not including any sale or rental of tangible property or any personal professional service rendered in connection with such advertising; . . .

(Emphasis added)

6-2.1-2-5 Rate of tax; income derived from certain utility transactions; activities taxable on gross earnings basis; other business activities

Sec. 5. The receipt of gross income from the following is subject to the rate of taxation prescribed in section 3(b) of this chapter: . . .

(7) operating any other utility which is not described in this section; . . .

(9) any activity which is not described in section 4 of this chapter, including the *provision of services* of any character, sales of real estate, rentals (except rentals described in section 4(6) of this chapter), the performance of contracts, and the investment of capital. . . .

(Emphasis added)

6-2.1-2-6 Rate of tax; income derived from certain wholesale and utility transactions

Sec. 6. The receipt of gross income from a transaction described in both sections 4(1) and 5(1) through (7) of this chapter is subject to the tax rate fixed in section 3(b) of this chapter.

Supreme Court, U.S.
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No. 90-38

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Petitioners

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; AND ALL OTHER SIMILARLY SITUATED COUNTIES AND CITIES,

Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF AMICUS CURIAE OF GREATER MEDIA CABLEVISION, INC. IN SUPPORT OF THE POSITION OF DANIEL L.MEDLOCK, et al.

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IN THE
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October Term 1990

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SUPREME COURT

Brief Amicus Curiae of Greater Media Cablevision Inc. in Support of the Position of Daniel L. Medlock, et at.

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THE INTEREST OF GREATER MEDIA CABLEVISION, INC.

Greater Media Cablevision, Inc. is a Delaware corporation providing cable television services to, among others, residents of the Commonwealth of Pennsylvania.

BRIEF SUBMITTED PURSUANT TO RULE 37

Greater Media Cablevision, Inc. submits this brief as amicus curiae pursuant to Rule 37 of the Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

At issue in this case is whether the taxing scheme applicable to mass communications media that was enacted by the Arkansas General Assembly violates the guarantees of freedom of speech and the press contained in the First Amendment to the United States Constitution. The Supreme Court of Arkansas held that the imposition of sales tax on cable television services by Act 188 of 1987 was unconstitutional, but declined to hold that a subsequent law, Act 769 of 1989, was also unconstitutional.

This case presents the important and unresolved question of whether a state may impose differential taxation on cable television as compared to other mass communication media, including newspapers and magazines, in the absence of any compelling state interest other than the general need to raise revenue. The continuing ability of the states to tax cable television in a manner different than that imposed on other forms of television and on newspapers and magazines threatens to undermine the constitutional guarantees of freedom of speech and of the press.

ARGUMENT

NO DIFFERENTIAL TAXATION OF MASS COMMUNICATIONS MEDIA SHOULD BE PERMITTED, ABSENT A SHOWING OF A COMPELLING STATE INTEREST OTHER THAN THE GENERAL NEED TO RAISE REVENUE

Two fundamental errors have been committed by the Arkansas General Assembly in enacting a sales tax on cable television services: the failure to recognize the discriminatory nature of such a tax when compared to (1) over-the-air television and "scrambled" satellite television; and (2) newspapers, magazines and other print media. This Court is presented with the opportunity to clarify its decisions in Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) and Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987), by holding that, in the absence of some compelling interest other than the general need to raise revenue, any tax imposed on cable television that is not also imposed on other forms of television technology and on newspapers and magazines violates the First Amendment to the United States Constitution in that it abridges freedom of speech and of the press.[1]

---

[1] The arguments regarding the applicability of the First Amendment guarantees to cable television will be discussed in the Petitioners' Brief.

A. The General Assembly of Arkansas Has Created a Taxing Scheme That Essentially Results in the Imposition of Tax on Only one Form of Television, in Violation of the First Amendment

When it enacted Act 188 of 1987, the General Assembly of Arkansas created the following tax situation: cable television services were subject to tax, as were magazines sold "over the counter." No other form of television was subject to tax, including satellite television that is received as a scrambled signal, nor was any tax imposed on newspapers or on magazines sold by subscription.

Subsequently, the General Assembly enacted Act 769 of 1989, which imposed a sales tax on scrambled television signals received by subscribers in Arkansas, but only if the billing took place within the state. The practical result of that taxation method is that few, if any, subscribers to satellite television are required to pay sales tax.

In addition, no one receiving over-the-air television is subject to sales tax on that service because no direct charge is made by over-the-air television companies for their services. Therefore, of the various types of television services, only one form of this First Amendment-protected form of speech, cable television, is effectively subject to taxation.

The basis for the taxing scheme imposed by Arkansas is very simple. The Respondents admit that the only motive in imposing the sales tax is to raise revenue. No other valid interest, such as defraying the cost of regulation, is identified as a reason for the imposition of tax in this manner. In fact, Arkansas has chosen the simplest means of collecting revenue, without regard to any determination of fairness or uniformity. Arkansas has, by doing so, taxed in dramatically different ways communications media that are virtually identical in their functions and in the services they provide to the public.

The three forms of television transmission that are involved in this case, cable, scrambled, and over-the-air, represent three stages in the development of providing television signals to the public. All three have considerable identity in their functions. The decision of the Commonwealth Court of Pennsylvania in Suburban Cable TV Co., Inc. v. Commonwealth, 131 Pa. Commw. Ct. 368, 570 A.2d, 601 (1990), now on appeal to the Supreme Court of Pennsylvania, demonstrates the almost complete functional identity between cable television and over-the-air television. Both of these forms of technology begin by receiving television signals in various ways and, using the same or

similar equipment, amplify, process, and modulate the signals before they are transmitted to the public. It is only in the final stage, sending the signal from the television station to the home television receiver, that a difference exists. Over-the-air television sends its signal out through the airwaves, while cable television uses cable, or a combination of cable and over-the-air technology, to transmit to the public. Over-the-air television makes no charge for its services directly to the subscriber, while cable television does. There is nothing inherent in either form of technology that dictates the manner in which it will earn the revenues that support it. It is conceivable that over-the-air television could have developed as a service that charged subscribers rather than one depending on advertising revenues, and it is also possible that cable television could have developed as a service dependent on advertising revenues.

"Scrambled" satellite transmission has elements of both of the technologies referred to above. It travels over the airwaves, like over-the-air television, but cannot be viewed without the payment of a fee, like cable television.

The technological difference in how the television signal is received by the public does not change the fact that

identical information is often received over all three media. Indeed, every cable subscriber receives most or all of the over-the-air television channels in his reception area, but through a cable rather than over-the-air. Significantly, the incidence of this tax falls on the form of television which, far more than the others, provides for the increased dissemination of ideas, thoughts, and speech. An over-the-air television viewer may receive news from two or three television stations, but a cable subscriber is typically able to receive a much larger number of channels, with a concomitant increase in the viewpoints that may be considered by the public. Cable television companies, by offering channels such as C-SPAN and CNN, provide a vastly greater amount of news to the public. It is this particular form of technology on which Arkansas has decided to impose the sales tax. Arkansas has chosen to burden one form of television only, and for the sole reason that the tax is easily imposed and collected from this form of television. This is the real basis for the Arkansas tax system: tax whatever form of television will provide revenue in the easiest manner.

It is submitted that no distinction among the various forms of television justifies the difference in taxation by the State of

Arkansas. As this Court stated in Minneapolis Star and Tribune, while a general tax that happens to include the press poses no threat,

> "[a] power to tax differentially... gives a government a powerful weapon against the taxpayer selected.... [D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.... Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot continue such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." 460 U.S. at 585.

In this case, what counterbalancing interest justifies the difference in taxation among the various forms of television? No state interest based upon the form of technology used to transmit or receive television signals has been suggested by Arkansas, nor is there a compelling interest related to the greater variety of programming available on cable television. There is no compelling state interest to justify the difference in the taxation among the various forms of television. There is, however, a state interest to justify the difference and that is the ease of collection of the tax. This is not, however, a compelling state interest, implicating, as it does, only the

state's need for revenue. Further, there are alternative methods of taxation that justify the state's need for revenue without requiring such complete differentiation among the several forms of television, such as income and franchise (value) taxes. Clearly, Arkansas has identified no compelling state interest that justifies the taxation of the several forms of television in such radically different ways.

Further, Arkansas cannot hide its different taxation of cable television and scrambled satellite television by stating that the form of taxation is the same but the incidence of taxation different. It has created a taxation scheme that makes it easy for almost all satellite subscribers to avoid that tax. Taxation that has the result of improper discrimination cannot be justified because the tax, on its face, does not appear discriminatory.

For these reasons, the taxation of cable television services by Arkansas should be held unconstitutional, on the basis of violation of the First Amendment by comparison with other forms of television.

B. By Comparison of the Taxation of Cable Television With the Taxation of Print Media, the Arkansas Sales Tax Violates the First Amendment

Arkansas imposes its sales tax on magazines sold "over the counter" and at newsstands while exempting newspapers and magazines sold by subscription. Thus, a significant portion of the print communications media escapes the sales tax. As is indicated above, those types of news media that are subject to the tax are those from whom it is easiest to collect the tax, a taxation scheme which should not survive analysis under the guidance provided by Minneapolis Star and Arkansas Writers' Project.

In its decision below, the Supreme Court of Arkansas stated as follows:

> In none of the cases discussed above, and in none of the other cases cited to us, do we find the Supreme Court holding that, for example, the failure to tax newspapers in the same manner as radio broadcasts violates the First Amendment. Each of the cases involved discrimination among competing mass communicators, each of whom was entitled to First Amendment protection. 301 Ark. at ___, 785 S.W. 2d at 204.

The Court further stated:

> We must hold, however, that a tax which discriminates between mass communicators delivering substantially the same service runs afoul of the First Amendment and the cases which prohibit discriminatory taxation among the purveyors of a particular medium. Id.

This Court should recognize that television, newspapers, and magazines are all mass communications media and that, for purposes of the protections provided by the First Amendment, there are no significant differences among them.

On the face of it, there appear to be many differences between television and newspapers. Although both convey information and entertainment to the public, and both charge a fee for doing so, they do it in very different ways. Should these differences permit Arkansas to impose a different taxation scheme? This Court should hold that they do not, and that, in the absence of some compelling state interest other than the mere need to raise revenue, no difference in taxation among any mass communications media can be allowed to exist.

In their Brief in Opposition to Petition for Writ of Certiorari, the Respondents described cable television as being "of a character completely dissimilar to the press." Brief at 8.

The error in this statement lies in the failure to ask for what purpose the comparison is being made. In this case, the purpose is to determine whether, for purposes of the First Amendment, the similarities among the communications media are sufficient to warrant requiring that they have the same method of taxation applied to them.

Both cable television and newspapers reach a large percentage of the population and, in recent years, have become the principal competing methods by which the American people receive information on current events. Both charge a fee for this service. Both contain daily news, entertainment, and sports. Both are somewhat ephemeral in nature, although they have permanent aspects as well. Cable television is seen by the viewer, but only preserved if the recipient chooses to tape it. A newspaper is printed on paper but is typically discarded promptly.

What are the differences? A newspaper is tangible property, can be held in the hand, and is generally purchased on an individual, daily basis. A newspaper has a singular nature about it, while cable television seems to have more variety. The distribution methods of the two media are very different. A newspaper is subject to no significant regulation,

while cable television is subject to regulation on the federal and local levels and sometimes on the state level.

Despite the foregoing obvious differences, it is submitted that no differences exist to justify the different taxation schemes. Both newspapers and cable television come into the home, although by different means. In both cases, something enters the home. While a newspaper is clearly tangible, cable television, consisting of light, can also be thought of as physically entering the home. The work of numerous physicists, including Albert Einstein and Max Planck, suggests that light may consist of particles which enter the home to deliver information to subscribers. As indicated, cable television may be accorded a more permanent nature through the use of a recording device.

Further, why should the greater variety of information received via cable television as compared to newspapers make a difference? A newspaper typically has numerous sections, corresponding to different channels on cable television. Many people subscribe to buy several newspapers and magazines. When these are "bundled" together, they are the functional equivalent of a cable television system. The fact that one form of communication must be read while the other is

projected in spoken words and pictures does not suggest any significant difference for purposes of the application of the First Amendment.

CONCLUSION

For these reasons, the decision of the Supreme Court of Arkansas should be affirmed with respect to its holding that Act 188 of 1987 is unconstitutional and reversed with respect to its refusal to determine that Act 769 of 1989 is unconstitutional.

Respectfully submitted,

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I hereby certify that on this 15th day of November 1990, I personally caused to be served upon the following, true and correct copies of the Brief Amicus Curiae of Greater Media Cablevision, Inc. in Support of the Position of Daniel Medlock, et al., in the within matter, by mailing same, first class and postage prepaid, to:

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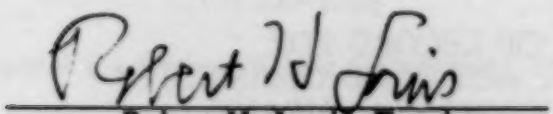

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DANIEL L. MEDLOCK, *et al.*,
Petitioners,
v.
JAMES C. PLEDGER, Commissioner of Revenue, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF *AMICI CURIAE* CITIES OF LOS ANGELES, CALIFORNIA AND DUBUQUE, IOWA IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-38

DANIEL L. MEDLOCK, *et al.*,
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On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF *AMICI CURIAE* CITIES OF LOS ANGELES, CALIFORNIA AND DUBUQUE, IOWA IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The City of Los Angeles, California, and the City of Dubuque, Iowa, each franchise and regulate cable television systems in their respective jurisdictions. They do so pursuant to the Cable Communications Policy Act of 1984 ("Cable Act"), codified at 47 U.S.C. §§ 521-22, 531-33, 541-47, 551-59, which "preserved the critical role of municipal governments in the franchise process." H.R. Rep. No. 934, 98th Cong., 2d Sess. at 19, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4656.

The City of Dubuque has an additional interest in this case since the State of Iowa has a generally applicable tax similar to the Arkansas gross receipts tax at issue here. The Iowa tax is applied to cable television service,

but not to newspapers. Iowa Code §§ 422.43 & 422.45.9 (1989). The State of Iowa provides as well for a local sales and service tax, which is imposed on cable television service in the City of Dubuque. Iowa Code § 422B.8 (1989).

The City of Los Angeles has a special interest in this case since it was the petitioner in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), which concerned a First Amendment challenge to the City's cable franchising requirements. The Court remanded the case for a fuller development of the disputed factual issues, holding that "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *Id.* at 495. The case is now awaiting entry of final judgment in the District Court. *Preferred Communications, Inc. v. City of Los Angeles*, No. 83-5846 (C.D. Cal. filed Sept. 17, 1983).

Contrary to Petitioners' suggestion that this case provides an opportunity for the Court to decide the issues left open in *Preferred* (Pets. Br. at 23), *amici* believe the case does not present the Court with the occasion to determine the First Amendment standard to be applied to the franchising and regulation of cable television systems. The record below addresses only the far more discrete issue of state taxation of cable television providers, not the scope of or interests served by cable regulation as envisioned by Congress in the Cable Act. As a result, the record furnishes an inadequate factual predicate for the Court to consider in any meaningful fashion the "competing societal interests" that justify cable franchising and regulation. *Amici* therefore urge the Court to address only the taxation issues presented in this case, and to await a fully developed factual record on the franchising and regulatory aspects of cable before resolving additional issues raised by the First Amendment's application to cable television franchising.

SUMMARY OF ARGUMENT

The Court's holding in *Preferred*, 476 U.S. at 494, that cable television "implicates First Amendment interests," cannot be transformed into a constitutional requirement that a state must tax newspapers and subscription magazines if it wishes to tax the retail sales of cable television service. The First Amendment does not require a state to give identical tax treatment to all commercial businesses that engage in activities that implicate First Amendment interests. The range of such businesses is wide indeed, ranging from books and movies to nude dancing, as well as inserts placed by a public utility in its monthly bills to consumers. Such businesses have long been subject to generally applicable taxes, and the mere fact that a commercial activity "implicates" the First Amendment does not insulate the activity from general taxation.

The Arkansas tax challenged here does not single out the press for any special or burdensome treatment, nor does it discriminate among different members of the same medium. Thus, it is free from the constitutional defects of the tax struck down in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). Nor does the Arkansas tax suffer from the content-based distinctions found impermissible in *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987). Indeed, when the challenged tax provision is viewed in the context of the State's sales tax scheme as a whole, it is readily apparent that the State has merely applied to cable television service a generally applicable sales tax that applies to a wide range of goods and services. Some of these goods and services implicate the First Amendment; others do not.

The First Amendment does not require the State to exempt all such businesses if it exempts one, as long as the distinction is made on nonspeech-related, content-neutral grounds. While cable television undoubtedly im-

plicates the First Amendment, it cannot seriously be suggested that cable cannot be distinguished from newspapers and subscription magazines.

In fact, cable is readily distinguished from newspapers and magazines on a variety of nonspeech-related, content-neutral bases. The Arkansas legislature is not alone in perceiving these distinctions. Congress also recognized that cable television is distinctly different from the print media, as well as broadcasting, when it enacted the Cable Act of 1984, and established a comprehensive regulatory framework for cable television.

Because cable may be distinguished from newspapers and magazines on a variety of content-neutral, nonspeech-related grounds, the tax at issue here does not violate the First Amendment. Moreover the Court can and should reach that conclusion without resolving the constitutional issues left open in *Preferred*. *Amici* therefore urge the Court to address only the specific taxation issues presented in this case, and await a fully developed factual record on the franchising and regulatory aspects of cable television before addressing the First Amendment's application to cable franchising and regulation.

ARGUMENT

THE FIRST AMENDMENT DOES NOT REQUIRE THE STATE TO ACCORD IDENTICAL TAX TREATMENT TO ALL COMMERCIAL BUSINESSES SIMPLY BECAUSE THEIR ACTIVITIES MAY IMPLICATE FIRST AMENDMENT INTERESTS.

A. This Case Does Not Present A Question of Discriminatory Tax Treatment Among Like Businesses.

This case presents the question of whether the First Amendment prohibits different tax treatment of different types of commercial businesses simply because some aspect of the businesses may implicate the First Amendment. *Amici* submit that the First Amendment does not prohibit such treatment.

Unlike *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), and *Minneapolis Star & Tribune Co. v. Minnesota Commisioner of Revenue*, 460 U.S. 575 (1983), on which Petitioners rely, the Arkansas tax at issue here does not single out the press. Nor does the tax distinguish between different publishers in the print medium. In *Arkansas Writers' Project*, a case involving content-based differential tax treatment among magazines, the Court found it unnecessary to reach the question of "the differential treatment of newspapers and magazines," and declined to decide "whether a distinction between different types of periodicals" would "invalidat[e] the sales tax, as applied to the press." 481 U.S. at 233.

This case falls a step beyond the question left undecided in *Arkansas Writers' Project*. Here the nonspeech-related differences between cable, satellite services, broadcasting, and periodicals are far more marked than the differences between newspapers and periodicals, let alone the inherently content-based distinctions among different types of periodicals found in the *Arkansas Writers' Project* tax.

This case is also unlike the tax struck down in *Minnesota Star*, which was a non-generic tax directed specifically toward newspapers, and which singled out a select group of newspapers based on size. In contrast, the Arkansas tax at issue here is a generally applicable "ordinary form[] of taxation." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). *Cf. Jimmy Swaggart Ministries v. Board of Equalization*, —— U.S. ——, 110 S. Ct. 688, 694-95 (1990) (citing *Minneapolis Star* and *Arkansas Writers' Project*). Newspapers and subscription magazines are exempted, but the tax otherwise applies generally to a broad and disparate range of sales of goods and services, irrespective of whether the activities of the commercial businesses being taxed might somehow implicate First Amendment interests.

Thus, the Arkansas tax is not imposed only on cable television and satellite services. It applies generally to a wide variety of sales of goods and services, some of which implicate speech-related activities and some of which do not. For example, the tax is imposed on sales of books, over-the-counter magazines, television sets, radios, video-cassette recorders, movie video tapes, records, audio tapes, movie theater tickets, tickets to live entertainment events, photography services, printing services, telephone service, gas service, and electric service. J.A. 122-23, 175-78. *See also* Ark. Stat. Ann. § 26-52-301 (1987 & Supp. 1989).

Consequently, this case presents the question of whether the First Amendment requires a state to give identical tax treatment to *all* commercial businesses that engage in *any* activity that might "implicate First Amendment interests." 476 U.S. at 494. The breadth of activity engaged in by commercial businesses that "implicate First Amendment interests" is wide indeed, ranging from nude dancing to books, movies, and even inserts placed by a public utility in its monthly bills to consumers. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *Butler v. Michigan*, 352 U.S. 380 (1957); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). These businesses have long been subject to generally applicable taxes, and *amici* submit that the mere fact that the commercial activity engaged in implicates First Amendment interests does not insulate such businesses from taxes of general applicability. Rather, where, as here, the tax distinctions drawn among commercial enterprises are based on content-neutral, nonspeech-related distinctions among the businesses in which they engage, such distinctions do not give rise to a First Amendment violation.

This conclusion is confirmed by the Court's reasoning in upholding regulations, taxes, and other laws of general applicability when applied to such traditional First

Amendment-related businesses as booksellers, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 698 (1986), and retail sales of religious materials, *Jimmy Swaggart*, 110 S. Ct. 688. *Amici* submit that the Court's reasoning in upholding the statutes at issue in *Jimmy Swaggart* and *Arcara* applies with equal force to the generally applicable tax at issue here.

Cable television system operators may not "claim special protection from governmental [taxation] of general applicability simply by virtue of their First Amendment protected activities." *Arcara*, 478 U.S. at 705. By definition, every tax "imposes some conceivable burden on First Amendment activities.' *Id.* at 706. Thus, while it may be true that a cable service provider paying the tax "has less money to spend" on the business than without the tax, that fact should not "give[] rise to a valid First Amendment claim." *Id.*

Indeed, unless the Court is prepared to suggest that the Free Speech Clause affords greater insulation from generally applicable taxes than the Free Expression Clause, the Court's unanimous decision in *Jimmy Swaggart* all but compels the conclusion that the generally applicable sales tax applied to cable and satellite services here is consistent with the First Amendment. In *Jimmy Swaggart*, the Court upheld the application of California's general tax on sales of tangible personal property to sales of religious materials, including books.[1] Like the California tax upheld in *Jimmy Swaggart*, the Arkansas tax at issue here "is not a tax on the right to disseminate . . . information, ideas, or beliefs *per se*; it is a tax on the privilege of making retail sales." 110 S. Ct. at 695-96. Those retail sales here include, but are hardly limited to, sales of cable

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[1] Ark. Stat. Ann. § 26-52-301(1), which is a subparagraph of the statute containing the tax provision challenged here, Ark. Stat. Ann. § 26-52-301(3)(D)(i), applies to sales of "tangible personal property," including retail sales of books. J.A. 122, 175.

television service. Consequently, because of its general applicability, the Arkansas tax presents "no danger that [a cable operator's] activity is being singled out for special and burdensome treatment." *Id.* at 696.

B. Compelling State Interest Analysis is Necessary Only Where, Unlike Here, A State Tax Singles Out the Press or Discriminates Among Members of the Same Medium That Are Indistinguishable On a Content-Neutral Basis.

Minneapolis Star holds that singling out the press or a specific class of publishers for differential tax treatment is presumptively unconstitutional. Implicit in this holding is the principle that if a tax does not single out the press or discriminate among members of the same press-related business, differential taxation may be justified without need for a judicial balancing of the state's interests against First Amendment interests. It is only where a tax differentiates among businesses that cannot be distinguished on a content-neutral, nonspeech-related basis that differential taxation must be justified by "a counterbalancing [state] interest of compelling importance that it cannot achieve without differential taxation." 460 U.S. at 585.

A careful examination of the Court's opinion in *Minneapolis Star* confirms this conclusion. In Part III, the Court addressed the question of whether Minnesota could single out the press for a "special tax that applies only to certain publications protected by the First Amendment." *Id.* at 581. Only after determining that the tax singled out the press did the Court hold that a special burden on the press could not stand "unless justified by some special characteristic of the press . . ." *Id.* at 585.

Differential tax treatment among members of the same medium, *i.e.*, among newspapers, is dealt with in Part V of the Court's opinion in *Minneapolis Star*. Although Part V does not explicitly refer to a two-step analysis, the

Court made the self-evident assumption that newspapers are homogeneous from a First Amendment perspective. The Court concluded that differential tax treatment of newspapers based on size was inherently suspect, and thus subject to a compelling interest justification.[2] A "tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." 460 U.S. at 592-93. Accordingly, only after the Court concluded that the tax at issue singled out some newspapers from others was there a need "to balance the burden implicit in singling out the press against the interest asserted by the State." *Id.* at n.7.

That *Minneapolis Star* establishes a two-part test is made quite clear by the structure of the Court's opinion in *Arkansas Writers' Project.* In Part III(A) the Court concluded that the Arkansas tax "targets a small group within the press." *Arkansas Writers' Project*, 481 U.S. at 229. The Court also found that the distinction drawn by the statute was content-based. *Id.* at 229-30. Only then did the Court, in Part III(B) of its opinion, consider the State's "heavy burden in attempting to defend its content-based approach to taxation . . . ." *Id.* at 231. The Court then applied the same compelling interest standard to discrimination among members of the same medium as it applied to the singling out of the press in Part III of *Minneapolis Star. Id.* at 231-32.

Thus, under *Minneapolis Star* and *Arkansas Writers' Project*, the question of whether a tax can be justified by a "compelling state interest," separate and apart from the government's interest in raising revenue, is reached

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[2] The Court found:

> Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.

460 U.S. at 591-92.

only *after*, and only *if*, the tax at issue singles out the press, or a narrow segment thereof, or subjects members of the same medium to content-based discriminatory tax treatment.[3] The Arkansas tax at issue here does neither.

C. Petitioners' Analysis Improperly By-Passes the Threshold Test of Whether the Tax At Issue Singles Out the Press or Discriminates Among Taxable Commercial Businesses Based on Content.

Petitioners err in telescoping the two-part test laid down in *Minneapolis Star*.[4] Thus, Petitioners leap from the Court's narrow holding in *City of Los Angeles v. Preferred Communications, Inc.*, that cable activities "implicate First Amendment interests," 476 U.S. 488, 494 (1986), to the conclusion "that cable television services should be equated and compared" to the traditional print media. Pets. Br. at 27.

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[3] Any doubt that *Minneapolis Star* and *Arkansas Writers' Project* must be read in this manner is dispelled by the Court's decision in *Jimmy Swaggart*. There is no suggestion in *Jimmy Swaggart* that the State had to articulate a compelling interest independent of its revenue interest in applying its tax provisions to books and religious materials. 110 S. Ct. at 697. Similarly, in *Arcara*, the Court did not require that application of the statute to a bookstore had to be justified by a compelling interest based on "some special characteristic" of bookstores or independent of the general interest served by the statute when applied in other, non-First Amendment-related contexts. *See* 478 U.S. at 705-07. Because the tax at issue in this case neither singles out the press nor subjects members of the same business to differential treatment, it too may be justified by the general governmental interest underlying taxes: raising revenue.

[4] Petitioners assert:

> [O]nce the challenging taxpayer has evidentiarily established the existence of this differential taxation among or between members of the press (*Arkansas Writers'*, 107 S. Ct. at 1729), then the burden of proof shifts from the taxpayer to the taxing authority to establish a 'compelling' governmental interest that is being served by this differential taxation.

Pets. Br. at 24 (footnotes omitted).

Petitioners' logic is flawed. Such an approach would result in compelling the State to afford identical tax treatment to *all* commercial businesses that happen to engage in any activity that "implicates" the First Amendment. If Arkansas exempts one class of business whose activities "implicate" the First Amendment, then it must exempt them all (or, alternatively, it must tax them all). If newspapers and subscription magazines are exempt,[5] then so must be retail sales of books, videotapes, records, cassettes, televisions, radios, videocassette recorders; photography and printing services; tickets to movies, theater, ballet, and nude dancing performances,[6] as well as communications-related public utility services like telephone.[7]

If the First Amendment were construed to require the State to extend its current narrow newspaper and subscription magazine exemption to all retail sales of goods or services that implicate the First Amendment, the certain result would be a massive erosion of the State's tax base, thereby frustrating its concededly substantial, indeed compelling, interest in raising revenue. *See Minneapolis Star*, 460 U.S. at 581. Alternatively, of course, the State could tax newspapers and subscription magazines, but it is hard indeed to believe that the First Amendment must be construed to compel such taxation.

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[5] Ark. Stat. Ann. § 26-52-401 (1987 & Supp. 1989); J.A. 118-20, 183-88.

[6] All of these sales are currently subject to the same sales tax as cable and satellite services under Ark. Stat. Ann. § 26-52-301. *See* J.A. 122-23, 175-78.

[7] Telephone service is also subject to the same sales tax as cable and satellite services. Ark. Stat. Ann. § 26-52-301(32); J.A. 177. Indeed, taking Petitioners' view to its logical conclusion, public utility services like gas and electric services, currently subject to the Arkansas sales tax (J.A. 177), would also arguably be exempt, since utilities can and do engage in activities implicating the First Amendment. *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530.

In fact, this Court's decisions in *Minneapolis Star* and *Arkansas Writers' Project* do not compel such a perverse result. The Court's decision in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), is instructive on this point. There the Court upheld against First Amendment challenge certain federal tax law provisions that denied tax deductions for contributions made to lobbying organizations, but permitted deductions for contributions made to veterans' organizations, even though such organizations also engaged in lobbying.

Like the tax deduction in *Regan*, the newspaper and magazine tax exemption that Petitioners seek to expand here is "a form of tax subsidy that is administered through the tax system."[8] 461 U.S. at 544. In not expanding the narrow exemption to include all commercial activities that implicate the First Amendment, Arkansas "has merely refused to pay for [those activities] out of public moneys." *Id.* at 545. A legislature has broad discretion in the field of taxation, where it possesses "the greatest freedom in classification." *Id.* at 547 (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)). A tax is constitutional unless there is an indication that it "was intended to suppress any ideas or any demonstration that it has had that effect." *Id.* at 548. There can be no such showing here, for the tax no more suppresses the business activities of cable operators than it does those of the wide range of other businesses subject to the tax.

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[8] Thus, *amicus* National Cable Television Association's ("NCTA") attempt to distinguish *Regan* fails. NCTA Br. at n.10. Contrary to NCTA's suggestion, the general denial of tax deductions for lobbying activities in *Regan* was, just like the tax at issue here, "a governmental exaction" from which the complaining taxpayer was not exempt. *Id.* And just like the deduction at issue in *Regan*, the Arkansas newspaper and magazine exemption is a "simple subsidy" that does not make taxed entities like cable operators "worse off in an absolute sense" and "therefore raises less constitutional concern." *Id.*

Accordingly, the question in this case, as it was in *Minneapolis Star*, *Arkansas Writers' Project*, and *Jimmy Swaggart* is whether the tax classification singles out (or is susceptible to singling out) a constitutionally protected activity "for special and burdensome treatment." *Jimmy Swaggart*, 110 S. Ct. at 696. As we show below, it does not.

D. The Tax At Issue Is Constitutional Because It Does Not Single Out Cable, and Cable Can Be Readily Distinguished From the Print Medium On Content-Neutral, Nonspeech-Related Bases.

When viewed in the context of the entire Arkansas sales tax scheme, rather than in isolation, it is apparent that Arkansas has not singled out cable service (or satellite services, for that matter) for any special or burdensome treatment. On the contrary, the record makes very clear that the specific tax provision challenged here merely makes cable television service subject to the same, generally applicable sales tax that Arkansas applies to a wide range of retail sales of goods and services. Some of these goods and services, such as book, record, videocassette, and theater ticket sales, "implicate" the First Amendment while others do not. As a result, the tax is no more susceptible to being used as a "powerful weapon" against providers of cable service than it is against providers of public utility services or, for that matter, sellers of furniture, candy, or shoes. The tax is thus readily distinguishable from the tax struck down in *Minneapolis Star*, which was unique to the press, and thus capable of becoming a "powerful weapon" aimed at the press. *Minneapolis Star*, 460 U.S. at 585.

Moreover, the tax at issue here is also distinguishable from the tax in *Arkansas Writers' Project*, which drew content-based distinctions among different magazine publishers. 481 U.S. at 229-30. The tax here, of course,

draws no distinction whatsoever, content-based or content-neutral, among providers of cable service.

Although Petitioners and their supporting *amici* argue at length about the supposed ways in which certain activities of cable operators "implicate" the First Amendment, they do not suggest that cable television service cannot be distinguished from the newspaper and subscription magazine businesses exempted from the Arkansas tax. Pets. Br. at 26-29. Nor do they explain why cable should be singled out for favorable treatment in the form of a tax exemption when other businesses whose activities also "implicate" the First Amendment are not.

In fact, the provision of cable service is easily distinguished from newspapers and magazines on a variety of content-neutral, nonspeech-related bases. Conversely, cable shares content-neutral, nonspeech-related attributes with many businesses that, like cable, are subject to the Arkansas sales tax.

For example, unlike newspapers and magazines, and like the public utility services subject to the tax, cable systems have the distinctive trait of providing service through a comprehensive distribution network that crosses public streets and rights-of-way. The distribution network is installed on utility poles or buried underground in conduit in public rights-of-way.[9] J.A. 79.

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[9] *Amici* Competitive Cable Association and the Media Institute ("CCA") assert "there is doubt as to the extent of the property interest held by local governments in [public] rights-of-way [occupied by cable systems], at least in some circumstances." CCA Br. at 12. However, every court that has addressed the question, including the one cited by CCA, has held that municipalities "have the right to hold in trust the public's property interests in the rights of way for cable television." *Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559, 1567 (N.D. Cal. 1988) (cited in CCA Br. at 12). *Accord Preferred Communications, Inc. v. City of Los Angeles*, No. 83-5846, Mem. Ord. at 11-12 (C.D. Cal. Aug. 24,

Unlike newspapers and magazines, and like the sale or rental of books, video tapes, records, cassette tapes, the sale of television sets and videocassette recorders, and the sale of ballet, theater and movie tickets that are subject to the tax, cable operators serve primarily as distributors to the public of information generated or performed by others. *See* Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 339-43; J.A. 77. Also unlike newspapers and magazines (and broadcasters, for that matter), which receive either all or the bulk of their revenues from advertising rather than retail customers, and like *all* other businesses subject to the Arkansas sales tax, cable television operators receive the bulk of their revenues from retail sales to the public.[10]

The Arkansas legislature is far from alone in perceiving that cable television is distinctly different from newspapers and subscription magazines. Congress has recognized the distinction between cable and the print medium (and broadcasting as well) in enacting the comprehensive regulatory framework for cable television that is embodied in the Cable Act. For example, the Act au-

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1990); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 962-63 & 972-74 (N.D. Cal. 1987), *further proceedings*, 679 F. Supp. 977, 979 (N.D. Cal. 1988); *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580, 594 (W.D. Pa. 1987), *aff'd*, 853 F.2d 1084 (3rd Cir. 1988). Thus, even if the Court were to find the sales tax at issue here unconstitutional, it should make clear that its decision is in no way intended to cast doubt on the constitutionality of cable franchise fees, which serve the independent and cable-specific governmental interest of providing compensation for a cable system's inherent and comprehensive use of public property. *E.g., Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal. 2d 272, 282 P.2d 36, 43 (1955) (franchise fee is "not a tax" but "compensation for the privilege of using the streets and other public property within the territory covered by the franchise").

[10] On its face, the tax at issue here does not apply to any advertising revenue a cable service provider might receive, so cable operators are treated no differently than newspapers, magazines, or broadcasters in this respect.

thorizes "a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition." 47 U.S.C. § 543(b)(1). In implementing this provision, the Federal Communications Commission ("FCC") recognized the dissimilarity between cable television and the print medium in concluding that neither newspapers nor magazines (nor, for that matter, the print medium in general) compete in the same market as cable. The FCC defined "effective competition" only in terms of the number of over-the-air television broadcast signals available to cable subscribers.[11] The FCC has consequently never considered either newspapers or magazines, or the print medium generally, to be "effective competition" to cable. Thus, Petitioners' efforts to equate cable television with the print medium is also at odds with objective, marketplace reality.

Moreover, Congress expressly recognized in the Cable Act that cable television operators would be subject to generally applicable state taxes such as the Arkansas tax challenged here. In Section 622 of the Cable Act, 47 U.S.C. § 542, Congress specifically provided that, in addition to the franchise fees that a franchising authority may impose, cable systems could be subject to any tax of general applicability, *viz.*:

> any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers).

47 U.S.C. § 542(g)(2)(A).

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[11] *See Implementation of the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 50 Fed. Reg. 18,637 (FCC 1985), *aff'd in part, rev'd in part sub nom. American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), *on remand*, Second Report and Order, 3 FCC Rcd 2617 (1988). *See also* 47 C.F.R. § 76.33 (1989).

Cable television companies and the cable systems they operate possess several other unique attributes that distinguish them not only from the printed press, but from most other businesses selling goods or services to the public. *Amici* believe that these attributes justify the scope of local regulation of cable systems established by Congress in the Cable Act. But on the record before it, the Court cannot and should not reach those issues here.[12] For present purposes, it is sufficient to recognize that

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[12] As the Court held in *Preferred*, an adequate factual record dealing specifically with cable franchising and regulation is necessary to address these issues. *Preferred*, 476 U.S. at 494. The complexity of the issues is evidenced by lower court opinions that have addressed them, with divergent results. *Compare Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990) (after *Preferred*, full contours of cable operator's first amendment right remain unshaped); *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 839 (1990) (*O'Brien* standard applied; local origination programming requirement upheld); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) (natural monopoly characteristics of cable sufficient under First Amendment to award exclusive franchise); *Omega Satellite Prod. Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (natural monopoly characteristics may justify entry regulation under First Amendment); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) (government can reasoably anticipate "media scarcity" in cable and has authority to ensure optimum use of medium); *Erie Telecommunications, Inc. v. City of Erie*, 569 F. Supp. 580 (franchise fee and access requirements upheld under *O'Brien*); *Carlson v. Village of Union City*, 601 F. Supp. 801 (W.D. Mich. 1985) (revocation of cable franchise subject to rational relation test and upheld under *O'Brien*); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985) (mandatory cable access requirements upheld under analogy to broadcasting medium); *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982) (content-neutral selection of single cable franchisee based on competitive bidding consistent with First Amendment) *with Pacific*

cable system operators are not newspaper or magazine publishers, and they may be readily distinguished from such print publishers on a variety of content-neutral, nonspeech-related bases.

Amici submit that the existence of such content-neutral, nonspeech-related distinguishing factors is sufficient to take the tax at issue here outside the scope of the suspect taxes in *Minneapolis Star* and *Arkansas Writers' Project.* Any other result here would extend the rationale of those cases to taxation of any business engaging in any activity that "implicates the First Amendment," thereby undermining the ability of the State to implement meaningful forms of tax classification and to raise revenue. Accordingly, the Arkansas statutes at issue here should be found constitutional.

West Cable Co. v. City of Sacramento, 672 F. Supp. 1322 (E.D. Cal. 1987) (city's single franchise policy unconstitutional); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (city's single franchise policy and access requirements unconstitutional by analogy to newspapers); *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465 (N.D. Cal. 1986) (exclusive cable franchising unconstitutional under *O'Brien* because it did not further city's articulated interest).

CONCLUSION

For the foregoing reasons, *amici* urge the Court to uphold the constitutionality of the Arkansas tax statutes at issue by affirming in part the decision of the Supreme Court of Arkansas.

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IN THE
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DANIEL L. MEDLOCK, *et al.*,
Petitioners,
v.

JAMES C. PLEDGER,
COMMISSIONER OF REVENUES, *et al.*,
Respondents,

CITY OF FAYETTEVILLE, ARKANSAS,
Intervenor.

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF OF AMICI CURIAE THE CITY OF NEW YORK, THE NATIONAL LEAGUE OF CITIES AND THE UNITED STATES CONFERENCE OF MAYORS IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-38

DANIEL L. MEDLOCK, *et al.*,
Petitioners,

v.

JAMES C. PLEDGER,
COMMISSIONER OF REVENUES, *et al.*,
Respondents,

CITY OF FAYETTEVILLE, ARKANSAS,
Intervenor.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF AMICI CURIAE THE CITY OF NEW YORK, THE NATIONAL LEAGUE OF CITIES AND THE UNITED STATES CONFERENCE OF MAYORS IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI

The City of New York is the nation's largest municipal cable television franchising authority. It has been involved in franchising and regulating cable television systems since 1964. The City has in place ten franchises for cable television systems, which have the potential of serving over two million households. The National League of Cities represents more than 16,000 cities and towns across the nation. The United States Conference

of Mayors represents the more than 800 mayors of cities with populations exceeding 30,000 residents.

Amici are concerned with the potential impact of the Court's decision on the ability of franchising authorities nationwide to regulate cable television—and, in particular, their ability to ensure that the public receives fair compensation from cable operators who make substantial use of valuable public resources. Amici therefore submit this brief in support of Respondents, urging that the Court uphold the constitutionality of the Arkansas sales tax insofar as it applies to the sale of cable television services.

SUMMARY OF ARGUMENT

It is well-established that: "Different communications media are treated differently for First Amendment purposes." *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("*Preferred*"); *accord*, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386 (1969). Consistent with that principle, governmental authorities have been permitted to establish different regulatory requirements for various media. Likewise, a taxing authority may impose different tax requirements on communications media, where such requirements are not content-related and are rationally related to differences in the media themselves.

The Court has not specifically delineated the First Amendment standards applicable to cable. *See Preferred*, 476 U.S. at 495-96 (record insufficient to determine whether, under the First Amendment, cable operators may be regulated more like newspapers than conventional broadcasters). However, federal, state and local governments historically have regulated cable in a manner different than newspapers, magazines and other communications media—an approach that Congress explicitly endorsed and clarified in the comprehensive Cable Communications Policy Act of 1984, Pub. L. No.

98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521-599 (Supp. II 1984)) ("Cable Act"). *See generally City of New York* v. *FCC*, 486 U.S. 57 (1988); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); National Telecommunications and Information Administration, *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations* at Appendix C (Regulation of Cable Television) (June 1988).

A principal basis for such different regulatory treatment is that cable, unlike newspapers and magazines, makes substantial commercial use of public resources. Cable operators obtain from state and local governmental authorities important benefits in the form of non-transient and disruptive access to public rights-of-way and the exercise of eminent domain powers. Such governmental benefits, which are made available to cable operators at non-market clearing prices, have the effect of affording virtually every cable operator a natural monopoly for the sale of cable services to the public. Newspapers and magazines do not receive any comparable benefits from state and local authorities.

There is nothing in the First Amendment or in the decisions of the Court that prohibits governmental authorities, in determining cable's tax treatment, from taking account of the significant governmental benefits that are accorded cable operators. It is perfectly reasonable for a governmental authority to determine that, in light of such benefits, cable should not be extended the same tax subsidies accorded newspapers and magazines—communications media that do not make comparable use of public resources and do not compete with cable in any meaningful way. The fact that cable operators may pay "franchise fees" (which are authorized by, and subject to the five percent cap set forth in, the Cable Act) does not preclude a taxing authority's consideration of the preferential treatment already afforded cable. Congress, in fact, recognized in the Cable Act that state and local

governments could impose generally applicable sales, entertainment and utility taxes on cable in addition to requiring payment of franchise fees.

Amici agree that the present case does not require the Court to delineate cable's First Amendment status. *See* Brief for Petitioners Daniel L. Medlock et al. at 19 ("Cable Pet. Br."); Brief of the National Ass'n of Broadcasters et al. at 4-7; Brief of the National Cable Television Ass'n at 24 n.16 ("NCTA Br."). The Court need not resolve in this case the issues that it left open in *Preferred*; indeed, the record here is not directed to the questions that the Court raised in *Preferred*. However, it is clear (as the trial court concluded) that cable's "use of public property, . . . along with the distinct and unique benefits gained by cable from use of that property, distinguishes . . . cable television from other communications media." Pet. for Writ of Certiorari at 19a ("Petition"). That distinction provides a constitutionally permissible basis for not according cable the same tax subsidies accorded print media.

ARGUMENT

THE FIRST AMENDMENT DOES NOT REQUIRE STATE AND LOCAL AUTHORITIES TO ACCORD CABLE TELEVISION OPERATORS THE SAME TAX SUBSIDIES AS NEWSPAPER AND MAGAZINE PUBLISHERS

This case involves a challenge under the First Amendment to an Arkansas law that extended the State's general sales tax to the sale of cable television services. The question presented is whether Arkansas must exempt cable operators from the sales tax simply because newspaper and magazine publishers receive such an exemption.

The Arkansas sales tax applies to various services and tangible goods. All of the State's cable operators pay the same tax, without regard to their size or the nature of

the programming that they offer. In addition, the tax is imposed equally on all those who, like cable television operators, charge the public for the right to view video programming—video store owners; movie theaters; and "any and all other[s engaged in the] distribution of television, video or radio services with or without the use of wires provided to subscribers or paying customers or users . . . ." Ark. Code Ann. § 26-52-301(3)(D), *as amended by* Act 769 of 1989 (*reprinted in* Petition at 24a). The sales tax also is imposed on water, gas and electric utilities which, like cable systems, make permanent use of the public rights-of-way.

The Arkansas tax applies to the fees that cable operators receive from their subscribers, but not to any other cable revenue. For example, the tax is not imposed on the revenue that cable operators derive from the sale of advertising (*see* NCTA Br. at 9 concerning the significance of cable advertising)—just as it is not imposed on the advertising revenue of newspapers, magazines or conventional radio and television broadcast stations. Cable operators also receive fees from those who purchase time to air particular programming on cable systems. The Arkansas sales tax is not imposed on that revenue—just as it is not imposed on the revenue that conventional broadcasters receive from those who purchase air time on their stations.

Petitioners Daniel L. Medlock et al. ("Cable Petitioners") nevertheless claim that the Arkansas law is impermissibly "discriminatory" because it exempts from taxation the sale of newspapers and magazines. Under their view of the First Amendment, such an exemption precludes the State from taxing the sale of cable services. Indeed, they suggest, it precludes levying the tax on the sale of any tangible good or service that includes speech protected by the Constitution. Their position, if accepted, would require governmental authorities to afford the identical tax treatment to every First Amendment communi-

cator, regardless of whether the medium of communication is a cable service, a radio station, a billboard, a fax machine or a tangible item (such as a newspaper or, for that matter, a T-shirt that contains some political message or a carton of Ben & Jerry's ice cream urging consumers to "Support Farm Aid" and to "Save Family Farms").[1]

As discussed below, the decisions of this Court in *Minneapolis Star* and *Ragland* (upon which Cable Petitioners rely) cannot properly be stretched to require that cable operators receive the identical tax exemptions accorded newspapers and magazines.[2] Moreover, Cable Peti-

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[1] Cable Petitioners contend that the identical tax treatment must be afforded all "members" of the print and electronic media. The Arkansas tax does treat cable operators the same as conventional radio and television broadcasters. Conventional broadcasters derive their revenue from the sale of air time to advertisers and programmers; as noted above, none of that revenue is subject to the Arkansas sales tax. In like fashion, none of the revenue that cable operators derive from the sale of advertising and other time is subject to the tax. Surely, the Constitution does not require Arkansas to devise a new taxation scheme to account somehow for the fact that cable operators have a source of income (subscriber fees) that conventional broadcasters do not enjoy; nor should Arkansas be required to impose its sales tax on broadcasters (who provide programming free-of-charge to the public) as a precondition to imposing that tax on cable operators (who sell such programming to the public). The Arkansas law also was amended in 1989 to bring within its ambit in-state distributors of satellite programming. Amici thus focus in this brief on the contention that cable must be taxed the same as the print media, specifically newspapers and magazines.

[2] *See Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) ("*Minneapolis Star*") (holding unconstitutional a Minnesota "ink and paper" tax imposed on the state's largest newspapers; evidence demonstrated that only 11-13 newspapers were subject to tax, and that only two newspapers paid the vast majority of the tax); *Arkansas Writer's Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987) ("*Ragland*") (holding unconstitutional the Arkansas sales tax insofar as it applied to certain special

tioners' extreme view of the First Amendment is inconsistent with other decisions of this Court, including *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983) ("*Regan*") (which Cable Petitioners do not mention), and with accepted First Amendment principles.[3] Before addressing the appropriate First Amendment analysis, we discuss 1) those considerations that set cable well apart from the print media for purposes of taxation; and 2) Congress' determination in the Cable Act concerning the taxes and other fees that may be imposed on cable.

I. Unlike Newspaper And Magazine Publishers, Cable Operators Make Extensive And Disruptive Use Of Valuable Public Resources. Governmental Authorities May Properly Take Account Of Such Differences In Choosing Not To Extend To Cable Operators A Tax Exemption Granted Newspaper and Magazine Publishers

It is clear that the "activities" of cable operators "implicate First Amendment interests." *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("*Preferred*"). It is equally clear, however, that:

> "Differences in the characteristics of new media justify differences in the First Amendment standards applied to them."

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 386 (1969). Thus, the Court in *Preferred* declined to rule on whether cable was entitled to the same First Amendment protection as the print media until a further record concerning the differences between cable and the print media

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interest magazines and not to general interest magazines; evidence demonstrated that only three magazines were subject to the tax).

[3] In *Regan* the Court upheld against First and Fifth Amendment challenges a federal law that granted tax exempt status to one group engaged in First Amendment activities but not to other such groups.

had been developed. Justice Blackmun, in a concurring opinion joined by Justices Marshall and O'Connor, explained that: "Different communications media are treated differently for First Amendment purposes." *Preferred*, 476 U.S. at 496; *accord*, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."); *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring); *id.* at 96 (Frankfurter, J., concurring).

Cable Petitioners and their supporting amici claim that cable systems are "similarly situated" to newspapers, magazines and other communications media and thus are entitled, under the First Amendment, to equal tax treatment with such media. Their descriptions of the media significantly exaggerate the extent to which cable may be compared fairly to newspapers and magazines.[4] More

[4] A cable operator may choose to carry certain programming services from a variety of those that are available—but there ends the operator's "editorial discretion." Unlike the newspaper or magazine publisher, the cable operator assumes no responsibility for reviewing or editing the overwhelming majority of material that it retransmits to the public; the programming service, and not the cable operator, assumes that responsibility. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 707 (1984). The cable operator thus functions more like a drug store owner that chooses the particular newspapers and magazines to sell, rather than the publisher of such material. *See generally* Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 336-43 ("Brenner"); Barron, *On Understanding The First Amendment Status of Cable; Some Obstacles In The Way*, 57 G.W.U.L. Rev. 201, 211 (1989). While even that activity warrants First Amendment protection, it does not support the claim that cable is constitutionally entitled to the same tax treatment as newspapers and magazines.

As for original material (the heart of a newspaper), the vast majority of cable systems simply do not have the resources to produce their own local programming. Indeed, nearly 75 percent of the cable systems in the United States have fewer than 5,000

importantly, however, by narrowly focusing on similarities that cable shares with all First Amendment communicators, Cable Petitioners fail to give adequate attention to the significant differences between cable and the print media—differences that historically and under the federal Cable Act have supported a different regulatory scheme for cable than for other media.

A principal difference is that cable operators receive from governmental authorities substantial commercial benefits that are not accorded newspapers and magazines. Such benefits fully justify a governmental authority's decision not to grant cable the same tax subsidies that are available to the print media.

In order to gain access to its paying subscribers, cable operators must make substantial use of valuable public property. Coaxial cable must be hung from utility poles, housed in underground utility ducts or otherwise placed in or across the public rights-of-way. Furthermore, cable operators necessarily depend upon state and local authorities to exercise their powers of eminent domain in order to ensure cable's access to private property. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (*"Loretto"*). The grant of a cable franchise by

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subscribers. 1990 Television and Cable Factbook at C-385. *See also* Cable Pet. Br. at 6 (average cable system in Arkansas has approximately 4,300 subscribers); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979) (striking down FCC rule that required cable systems with more than 3,500 subscribers to originate a small amount of programming). While the nation's largest cable system with 535,000 subscribers may have its own news channel, NCTA Br. at 8, this is the rare exception. *See also id.* ("dozens" of cable operators may insert some local news in the CNN service, but there are nearly 10,000 cable systems in the United States). Local programming is most often available only on access channels, over which cable operators have no editorial control. *See* Cable Act §§ 611(e) & 612(c)(2), 47 U.S.C. §§ 531(e) & 532(c)(2).

As one commentor has correctly observed, *cable "operators' speech interests appear relatively lightweight . . . ."* Brenner, 1988 Duke L.J. at 331 (emphasis added).

a franchising authority carries with it the right to make the necessary use of public property and easements. Cable Act § 621(a)(2), 47 U.S.C. § 541(a)(2). Such grant allows the cable operator to obtain, at one time and at non-market clearing prices, all the necessary rights to reach that operator's subscribers—rights that are particularly valuable because they might otherwise be "impossible to negotiate individually." Brenner, 1988 Duke L.J. at 345-46. Furthermore, the grant of even a non-exclusive cable franchise by a franchising authority typically has the effect of according the cable operator a natural monopoly over the provision of cable services in its community.[5]

No newspaper or magazine receives any comparable benefits from local or state governments. To be sure, newspapers and magazines make transient use of public rights-of-way. But that use is not comparable to the permanent use that cable seeks. The difference was implicitly recognized by the Court in *Loretto*, when it held that a state statute affording cable access to private prop-

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[5] The cable industry obviously attaches significant value to the grant of the franchise. *See, e.g., Tele-Communications, Inc.* v. *Commissioner*, No. 268-89 (T.C. Nov. 7, 1990), 1990 WL 170429 (Tax Court) (sustaining claim by nation's largest operator of cable systems that, for depreciation purposes, cable franchise represents approximately 40 percent of the value of the purchase price of certain cable systems). Tele-Communications, Inc. successfully argued in that case that a cable operator enjoys a natural monopoly as a result of being awarded a franchise. The Tax Court agreed, noting that: "[E]ven if a local government wanted a second cable television company to construct another system for purposes of competition, it is extremely unlikely that another operator would enter the market when the return on the investment simply would not justify the expenditure." *Id.*, 1990 WL 170429; *see also* H.R. Rep. No. 682, 101st Cong., 2d Sess. 42 (1990) (less than one percent of communities in the United States have more than one cable system); *Central Telecommunications, Inc.* v. *TCI Cablevision, Inc.*, 800 F.2d 711, 713-17 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982).

erty constituted a "taking." Quoting from a case that involved a telegraph company's occupation of public rights-of-way, the Court noted:

> "'*The use which the* [*telegraph company*] *makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public* . . . . Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of highway and personal travel, wholly lost to the public . . . .'"

Loretto, 458 U.S. at 428-29, *quoting St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92, 98-99 (1893) ("*Western Union*") (emphasis added). Moreover, there are physical and aesthetic burdens involved in the construction and continual maintenance of cable systems. Such inevitable disruptions of the public order also distinguish the use that cable makes of public property from that made by newspapers and magazines.[6]

Because cable operators derive substantial commercial benefits from the use and disruption of public property and the exercise of public authority, there should be no question that the public deserves adequate compensation. As the Court in *Loretto* noted:

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[6] *See Preferred*, 476 U.S. at 493. "The distinction between newspapers and cable becomes especially clear when considered in light of the impact of each upon the public domain." Note, 53 Tenn. L. Rev. 179, 194 (1985), *citing Community Communications Co.* v. *City of Boulder*, 660 F.2d 1370, 1377 (10th Cir. 1981) ("To disseminate information, a newspaper need not use public property in the same way that a cable operator does. A newspaper may reach its audience simply through the public streets or mails, with no more disruption to the public domain than would be caused by the typical pedestrian, motorist, or user of the mails. But a cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways."), *cert. dismissed*, 456 U.S. 1001 (1982).

> "'It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, *the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.*'"

Loretto, 458 U.S. at 429, *quoting Western Union*, 148 U.S. at 101-102 (emphasis added). *See also Preferred Communications, Inc.* v. *City of Los Angeles*, No. CV 83-5846 (CBM) (Bx), slip op. at 12 (C.D. Cal. 1990) (it would be "unreasonable to assert that a commercial cable operator should be permitted to profit from public rights of way without compensating the public for the enjoyment [of] those rights simply because their enterprise involves certain First Amendment protections").

Cable Petitioners contend that the public receives adequate compensation from the "franchise fees" which are authorized by, and subject to the cap set forth in, Section 622 of the Cable Act, 47 U.S.C. § 542. As discussed below, Cable Petitioners have mischaracterized the nature and purpose of franchise fees. More importantly, the payment of such fees does not preclude a taxing authority from taking account of the valuable governmental benefits already accorded cable; a state or local government may reasonably conclude that, in light of such benefits, it will not provide cable a further subsidy in the form of an exemption from a generally applicable sales tax.

II. Congress In The 1984 Cable Act Properly Balanced Cable Operators' First Amendment Interests. The Balance Struck By Congress Contemplates That Governmental Authorities May Impose Upon Cable Operators Taxes That Are Inapplicable To Newspaper And Magazine Publishers

The Cable Act represents Congress' effort to establish, for the first time, a comprehensive national policy for dealing with cable television. *See generally City of New*

York v. *FCC*, 486 U.S. 57 (1988). A principal objective of the Cable Act was to set forth "guidelines for the exercise of Federal, State and local authority with respect to the regulation of cable systems." 47 U.S.C. § 521(3). In "firmly establish[ing] the authority at each level of the government," H.R. Rep. No. 934, 98th Cong., 2d Sess. 24 (1984) ("Committee Report"), Congress was called upon to balance a number of different and often conflicting considerations with regard to a wide range of issues. Congress sought to achieve its objective mindful of the need to protect "cable operators' First Amendment interests." *Id.* at 36.

Congress responded to the conflicting interests by authorizing the FCC and franchising authorities to regulate cable in a number of respects that plainly differentiate cable from newspapers.[7] Among other things, Congress authorized state and local governments to grant and to renew cable franchises; to establish requirements for access channels; to regulate cable rates in circumstances defined by the FCC; to require that cable operators provide certain services, facilities and equipment; to estab-

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[7] The relationship between the Cable Act and cable operators' First Amendment rights was summarized by one cable attorney as follows: "[T]he nature of the relinquishments that the cable industry yielded up seems clearly to mark a concession by cable that it stands somewhere below newspapers on the publishing ladder." Schildhause, *Preferred Communications: Preamble to Breakup of Local Cable Franchising*, 7 Pace L. Rev. 1, 23 (1986).

The fact that Congress in the Cable Act has treated cable differently than the print media does not, of course, prevent the Court from reaching a contrary determination under the Constitution. However, as the Court noted in a related context, "The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." *CBS Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973); *see also id.* at 102-03 (in evaluating First Amendment claims, Court does not "defer" to Congress but does "afford great weight to the decisions of Congress and the experience of the [Federal Communications] Commission"); Brenner, 1988 Duke L.J. at 383-84.

lish customer service and construction-related requirements; and to adopt technical standards not inconsistent with FCC standards. In addition, Congress specifically authorized franchising authorities to collect cable television "franchise fees." Cable Act § 622(a), 47 U.S.C. § 542(a). Congress set a five percent cap on the amount of such fees.[8] It made clear, however, that taxes such as the Arkansas sales tax at issue here are not "franchise fees" and, therefore, are not counted toward the five percent cap.

Congress did so by defining the term "franchise fee" as including "any tax, fee or assessment of any kind" imposed upon cable operators "*solely* because of their status as such." Cable Act § 622(g)(1), 47 U.S.C. § 542(g)(1) (emphasis added). It also said that the term does *not* include "any tax, fee, or assessment of *general applicability* (including any such tax, fee or assessment imposed on both utilities and cable operators or their services but not including a tax, fee or assessment which is unduly discriminatory against cable operators or cable subscribers) . . . ." Cable Act § 622(g)(2)(A), 47 U.S.C. § 542(g)(2)(A) (emphasis added). The Committee Report explains that a tax of "general applicability" (not subject to the 5 percent cap) includes:

> "such payments as a *general sales tax, an entertainment tax imposed on other entertainment businesses as well as the cable operator, and utility taxes or utility user taxes* which, while they may differentiate the rates charged to different types of utilities, do not unduly discriminate against the cable operator so as to effectively constitute a tax directed at the cable system."

Committee Report at 64 (emphasis added).

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[8] Section 622(b) of the Cable Act, 47 U.S.C. § 542(b), provides that: "For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system should not exceed five percent of such cable operator's gross revenues derived in such period from the operation of the cable system."

Congress did not break new ground in this definition; it effectively codified existing FCC policy. The FCC had previously ruled that utility taxes imposed on cable operators are not cable "franchise fees"—even though such taxes, by definition, are not imposed on newspapers, radio or television. *Sammons Communications, Inc.*, 61 F.C.C.2d 452 (1976). Likewise, the Commission had concluded that state sales and use taxes are not "franchise fees"—even though newspapers, radio and television may be exempt from such taxes. *Memorandum Opinion and Order in CSR-479*, 50 F.C.C.2d 540 (1975). *See also Memorandum Opinion and Order in Docket 20018*, 49 F.C.C.2d 1078, 1084 (1974) ("We have not preempted the field of state or local taxation of cable television, nor do our franchise fee limitations [§ 76.31(b)] apply to the normal taxes imposed by cities and states on cable operators doing business or owning property in their taxing jurisdiction.").

In short, Congress concluded in the Cable Act that it is entirely appropriate for governmental authorities to impose a franchise fee on cable operators solely because of their status as such. Congress did place a limit on the amount of the franchise fee that could be charged. However, it arrived at a five percent cap, recognizing that governmental authorities would derive additional revenues from cable operators in the form of general sales, utility, entertainment and comparable taxes which are not directed solely at cable (*e.g.*, the Arkansas sales tax).[9]

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[9] When the Cable Act became law in 1984, several states imposed on cable operators various taxes from which newspapers were exempt. For example, revenue from cable television service was subject to a sales tax in South Dakota. *Opinion of the Attorney General* (South Dakota), No. 74-28, July 11, 1974. Florida and Wisconsin taxed both cable installation and service. *American Video Corp.* v. *Lewis*, 389 So. 2d 1059, 1061 (Fla. Dist. Ct. App. 1980); Wis. Gen. Sales and Use Tax Law §§ 77.52(2)(a)12 (1989), as added by Ch. 317, Laws 1975. Courts in New Jersey and New

III. Under The Decisions Of The Court Construing The First Amendment, Governmental Authorities May Exempt Newspaper and Magazine Publishers From A Generally Applicable Sales Tax Without Extending That Subsidy To Cable Operators

Cable Petitioners place principal reliance upon the Court's decisions in *Minneapolis Star* and *Ragland*. Neither decision, however, provides a proper basis for requiring the same tax treatment of cable, on the one hand, and newspapers and magazines, on the other hand. Rather, the Court's decision in *Regan* recognizes that a legislature may, in appropriate circumstances, exempt from a general tax one group that exercises First Amendment rights while not exempting another such group. A content-neutral exemption such as that provided newspapers by the Arkansas statute is not only consistent with fundamental First Amendment principles; it also furthers the goals of the First Amendment.[10]

York also determined that the installation of cable service was taxable. *New Jersey State Tax News*, Division of Taxation, January/February, 1983; *In the Matter of the Application of Amherst Cablevision, Inc.*, State Tax Commission, September 14, 1980 (TSB-H-80) (208) S, Sales Tax, November 18, 1980, 1980 WL 6992 (N.Y. Dept. Tax Fin.). Indiana and Ohio courts held that equipment used to produce and transmit cable television signals was taxable. *Ind. Dept. of St. Rev., Etc.* v. *Cable Brazil, Inc.*, 177 Ind. App. 450, 380 N.E.2d 555, 558 (Ind. App. 1978); *T.V. Antenna Systems, Inc.* v. *Bowers*, Ohio BTA, No. 44357, April 11, 1961. Indiana's Code provided for a sales tax on cable television service, as well. *Ind. Dept. of St. Rev.* v. *Cable Brazil, Inc.*, 177 Ind. App. 450, 380 N.E.2d 555, 558 (Ind. App. 1978).

[10] Cable Petitioners also rely on various state court decisions. However, no state court, other than those below, has considered whether a sales or comparable tax may be imposed on the sale of cable services if not also imposed on the sale of newspapers and magazines. All but two of the decisions cited by Cable Petitioners deal with the issue reserved in *Ragland*—i.e., tax treatment of magazines and newspapers; the remainder deal with the tax treatment of newspapers and conventional broadcasting.

A. The Court in *Minneapolis Star* invalidated on First Amendment grounds a Minnesota tax imposed on the ink and paper purchased by the state's largest newspapers. The Court found that the discrimination took two different forms: 1) it singled out newspapers among all enterprises for a special tax; and 2) it targeted a small group of newspapers to pay that tax (less than four percent of all the state's newspapers were actually subject to the tax). The Court held that such discriminatory taxation could not stand absent "an overriding governmental interest." 460 U.S. at 582-83.

Neither form of discrimination is present here. The Arkansas tax is a sales tax of general applicability which applies to a broad range of goods and services. *See* 460 U.S. at 581, 588 n.9 (suggesting that Minnesota could have constitutionally applied its general sales tax to newspapers). Furthermore, it applies uniformly to all cable operators and, indeed, to all those who (like cable operators) sell video programming to the public. *See* pages 5-6 *supra*. Such a broad-based, content-neutral statute poses little risk of the illicit government intent or distortion of ideas inherent in the Minnesota tax. 460 U.S. at 591-92.[11]

The Court in *Minneapolis Star* explained that differential tax treatment may be "justified by some special characteristic of the press . . . ." 460 U.S. at 585. Precisely such a justification exists with regard to cable. Unlike newspapers and magazines, cable operators receive substantial governmental benefits through use of public

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[11] The Court in *Minneapolis Star* expressed its suspicion that the targeting of small segments of the press is really a guise for content discrimination, by reference to its decision in *Grossjean* v. *American Press Co.*, 297 U.S. 233 (1936). In that classic case of content-based taxation, the Court explained, the Louisiana government deliberately attempted to silence the expression of the largest state newspapers because they had "ganged up" against Senator Huey Long. 460 U.S. at 579-80, *referring to Grossjean*, 297 U.S. at 250-51.

resources. *See* pages 9-11 *supra*. The State of Arkansas is fully justified in choosing not to accord cable any further subsidy in the form of a tax exemption granted newspapers and magazines.

B. The Court in *Ragland* invalidated the Arkansas sales tax insofar as it applied to sales of general interest magazines and not to "religious, professional, trade and sports journals." The Court found that, as in *Minneapolis Star*, the Arkansas tax impermissibly singled out a "small group" within the press for special taxation —specifically, only three publications. 481 U.S. at 228. The Court noted that the "burden of the tax" rested upon a very narrow grouping of publishers, 481 U.S. at 229 n.4, which might indicate that the distinctions drawn were content-based. Again, no such "small group" is singled out by the Arkansas tax as it applies to cable operators and others who sell video programming.

Moreover, the Court in *Ragland* found particularly "disturbing" the fact that the state had differentiated among magazines solely on the basis of content—i.e., in order to determine whether the magazine was exempt from taxation, state officials had to consider whether the magazine was devoted solely to religious, professional, trade or sports issues. 481 U.S. at 230. The Arkansas sales tax, insofar as it applies to the sale of all cable services, contains no such content-based discrimination. Nor is there any real danger of content-based discrimination where, as here, an entire medium of communications is subject to a particular tax.

Cable Petitioners state that the instant case "simply presents the vehicle for this Court to answer the question it reserved in [*Ragland*]." Cable Pet. Br. at 19. But that statement is incorrect. The Court in *Ragland* reserved the question of whether "a distinction *between different types of periodicals* [i.e., newspapers and magazines] presents an additional basis for invalidating the sales tax, as applied to the press" (481 U.S. at 233

(emphasis added))—not whether periodicals must be taxed the same as a different communications medium (cable television).

C. In focusing on *Minneapolis Star* and *Ragland*, Cable Petitioners have overlooked *Regan*. The Court in *Regan* upheld an internal revenue statute which generally denied tax exemptions for organizations engaged in lobbying, though veterans' organizations received a tax exemption regardless of lobbying activities. The Court stressed the long-standing principle that "a legislature's decision not to subsidize the exercise of a fundamental right *does not infringe* the right, and thus is not subject to strict scrutiny." 461 U.S. at 549 (emphasis added). The Court found that the tax statute satisfied the general rule that statutory classifications must "bear a rational relation to a legitimate governmental purpose," and held the tax to be valid. *Id.* at 547, 549-51.

Like the statute in *Regan*, the Arkansas statute taxes two distinguishable groups of speakers differently, but does not prevent any group from exercising its First Amendment rights. As in *Regan*, the Arkansas legislature has not distinguished between media groups on the basis of the content of their speech; nor is there any indication that application of the tax statute would suppress any particular ideas. *See* 461 U.S. at 546, 548. The legislature merely seeks to fulfill its obligation to "fit [its] tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden." *Id.* at 547, *quoting Madden* v. *Kentucky*, 309 U.S. 83, 87-88 (1940). Given the substantial use of public resources by cable companies, there is a strong, rational basis for the Arkansas legislature's decision not to provide a further subsidy to cable.

D. The Arkansas sales tax does not threaten First Amendment interests. *First*, the tax is not content-based, and does not suppress any particular point of view. By exempting one medium while imposing a tax

on the entirety of another medium, the statute does not provide an advantage to any side in a debate. The medium of cable television is not Democratic or Republican, not liberal or conservative. Rather, as Cable Petitioners allege, cable television transmits a broad spectrum of views and information. Thus, even if a government tax on cable television services but not on newspapers and magazines favors the print medium, the tax does not create a distortion in the political process or increase the risk of political extremism.[12] Nor does the statute threaten the "search for truth," another core concern of the First Amendment. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 781 (1976) (*"Bellotti"*).

Second, a tax on cable television does not result in a discriminatory or lesser degree of First Amendment protection for cable, because the taxed medium is not in direct competition with any tax-exempt or subsidized groups. Cable television and newspapers are not substitutes in any meaningful consumer sense.[13] Therefore, the demand for cable television compared to newspapers may be essentially inelastic, i.e., an individual will not likely turn from cable television to newspapers simply

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[12] *See Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . government must afford all points of view an equal opportunity to be heard"); Note, *Content Regulation and the Dimensions of Free Expression*, 96 Harv. L. Rev. 1854, 1865-66 (1983) (First Amendment protects the community's fundamental interest in "expression relating to self-government").

[13] Relying on statements contained in three newspaper articles, NCTA claims that there is "significant competition" between cable and newspapers; such competition, says NCTA, provides a "further indication of the close parallels, for First Amendment purposes," between cable and newspapers. The FCC, however, has squarely rejected the unsupported notion that cable and newspapers engage in any significant competition. FCC, *Report in MM Doc. No. 89-600* at pp. 35-36 (1990).